The Senate

Economics
Legislation Committee

National Consumer Credit Protection Bill 2009
and related bills [Provisions]

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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), S*ubmission 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.

Chapter 2

Background and summary of the main National Consumer Credit Protection bills

A Brief History of Australia's Consumer Credit Laws

2.1 Although the Australian Constitution does not give the power to make consumer law to the Commonwealth, in recent years there has been a shift towards consensus consumer protection laws between the States, Territories and the Commonwealth.

2.2 Australian consumer credit regulation has a long history stretching back to the 1960s. In his Second Reading Speech for the Consumer Credit (Queensland) Bill 1994, the then Queensland Minister for Consumer Affairs, the Hon. Tom Burns, said:

> The conditions pertaining to credit in the late sixties and early seventies were far different than those pertaining by the mid-eighties, let alone the 1990s. In the 1960s, the market was dominated by finance companies, and, for example, variable interest consumer loans were unknown, as were credit cards and the range of hybrid products now available.[1]

2.3 During the 1970s a number of inquiries in Australia (such as the Molomby Committee of 1972-73) and in the United Kingdom (such as the 1971 Crowther Report) called for reforms of consumer credit laws and, particularly, the establishment of a uniform approach to the regulation of credit. In 1973, the Standing Committee of Attorneys-General agreed to the foundation of a credit laws committee consisting of State and Commonwealth representatives and three members of the Molomby committee with a brief to develop model consumer credit legislation for introduction in all State and Territory parliaments.

2.4 In 1981, NSW and Victoria simultaneously introduced legislation which was widely criticised for the lack of uniformity in essential areas. By the late 1980s, Queensland, Western Australia and the Australian Capital Territory had also enacted consumer credit legislation.

2.5 By the end of the 1980s, a lack of consistency between the various pieces of State and Territory legislation was becoming an increasing problem. Many consumer credit laws were criticised for being drafted in a complex and convoluted manner, with extremely large penalties for technical breaches. Some laws, though intended to regulate by substance and not by form, forced credit providers into a narrow range of products and inhibited creativity and innovation. These restrictions substantially limited competition. Furthermore, the limited scope meant that not all credit providers were covered. For example, in most States, the legislation did not cover building societies or credit unions and a range of products (including housing finance).

[1] The Hon. Tom. J. Burns, *Queensland Legislative Assembly Hansard,* 4 August 1994 p. 8828.

2.6 In July 1993, representatives of each State and Territory Government signed the Australian Uniform Credit Laws Agreement 1993, which stated:

> …that without fettering the powers of future Parliaments the Scheme will provide for the introduction of Initial Legislation into the Parliament of the State of Queensland and require the other States and Territories to do one of the following:
>
> (i) adopt that Initial Legislation; or
>
> (ii) enact and maintain legislation which is consistent with the Initial Legislation.[2]

2.7 The Queensland Legislative Assembly passed their model Consumer Credit (Queensland) Bill in 1994, which contained a Consumer Credit Code. In accordance with their agreement, this code was adopted by all the other States and Territories and became known as the Uniform Consumer Credit Code (UCCC).

2.8 Despite this uniformity in the Credit Code, different credit licensing schemes emerged in some states. As Mr John Brady of the National Financial Services Federation said:

> It is harder to get a licence in WA than it is to do almost anything else. There is a six-week period between making an application and getting a licence. They have regular audits. They turn up and look at files. It is very good, and hopefully this system will be at least as good as that. To get a licence in Victoria you write a letter and the licence comes back in the mail the following day. The ACT has a similar documentary requirement to WA, but from what I can gather—and I apologise in advance to the ACT regulators if I am wrong about this—they do not look at the documents that are given to them; they just issue the licence in any event. In the ACT there is no-one, really, who is a lender just in the ACT. They are always outside the ACT as well. WA is very good; the rest are at least equivocal.[3]

The Consumer Credit Protection Reform Package

2.9 The Consumer Credit Protection Reform Package furthers the goal of a national, uniform approach to consumer credit laws and includes a national licensing scheme to overcome some of the current inconsistencies. The Hon. Chris Bowen MP, Minister for Financial Services, Superannuation and Corporate Law, said during his Second Reading Speech that the bills provide for:

> …one single standard and uniform regime for consumer credit regulation and oversight.[4]

2.10 The bills are based, in part, on a referral of constitutional powers by the states. The new regime gives effect to the Council of Australian Governments' (COAG)

[2] Australian Uniform Credit Laws Agreement, 30 July 1993.

[3] Mr John Brady, National Financial Services Federation, *Proof Committee Hansard*, 24 August 2009 p. 26.

[4] The Hon. Chris Bowen MP, *House of Representatives Hansard*, 25 June 2009 p. 1.

agreement on 26 March and 3 July 2008 to transfer responsibility for regulation of consumer credit, and a related cluster of additional financial services, to the Commonwealth and implements the first phase of a two-phase Implementation Plan to transfer credit regulation to the Commonwealth.[5]

Phase 1 and Phase 2

2.11 The first phase will nationalise the consumer credit code and make certain improvements to that code (such as the introduction of responsible lending obligations, which includes assessing the suitability of a credit contract and the responsibility to verify information and make reasonable inquiries).

2.12 The second phase of the reforms will include a range of other improvements to the regulation of consumer credit and, in preparation for that phase, the Government and ASIC are undertaking further consultation to discuss issues such as the introduction of new disclosure requirements, the inclusion of other types of consumer products (such as goods rentals and leases) and the issuance of guidelines explaining how the new regulations will be treated by ASIC.

The Phase 1 reform package

2.13 In addition to translating the UCCC into Commonwealth law, there are four main components to the legislative reforms in the Phase 1 package:

- an Australian Credit Licence (ACL) regime to be administered by the Australian Securities and Investments Commission (ASIC) for those engaging in credit activities;
- industry-wide responsible lending conduct requirements for licensees;
- improved sanctions and enhanced enforcement powers for the regulator (ASIC); and
- enhanced dispute resolution mechanisms, court arrangements and remedies for consumer protection.

The National Consumer Credit Protection Bill 2009

2.14 The National Consumer Credit Protection Bill 2009 is the primary bill in the package. The bill includes five important aspects: 1) a national licensing regime; 2) responsible lending obligations; 3) sanctions and remedies; 4) a critical dispute resolution mechanism; and 5) the National Credit Code.

The National Licensing Regime

2.15 The bill outlines the requirement for a person engaging in credit activities (defined below) to hold an Australian Credit Licence (ACL) and the obligations imposed on such licences. The key elements of this licensing regime are that:

- it requires a person who is engaged in credit activities to, initially, be registered with ASIC, and to subsequently hold an ACL;

[5] National Consumer Credit Protection Bill 2009 *Explanatory Memorandum* p. 3.

- it imposes entry standards for registration and licensing, and enables ASIC to refuse an application where the person does not meet these standards;
- it requires registered persons and licensees to meet ongoing standards of conduct while they engage in credit activities; and
- it empowers ASIC to suspend or cancel a licence or registration, or to ban an individual from engaging in credit activities.[6]

2.16 The licensing process will start on 1 January 2010. Before that date, anyone engaging in credit activities will need to be registered with ASIC, and must apply for registration between 1 November 2009 and 31 December 2009. They will then have the six-month period between 1 January 2010 and 30 June 2010 to apply for an ACL. Further details of the transitional arrangements follow later in this report.

2.17 The Explanatory Memorandum explains that participants will need to hold a licence if they engage in any of the following credit activities:

- entering into credit contracts of consumer leases;
- collecting money due under a credit contract (including where the lender has ceased providing credit, and where an assignee has purchased the debts from the original credit provider);
- acting as an intermediary between the borrower and the lender (principally as finance brokers, but not exclusively so, with the definition also covering bodies such as introducers, mortgage managers and aggregators); or
- suggesting or providing assistance in respect of a specific credit product with a particular credit provider.[7]

2.18 It is expected that ASIC will issue guidelines on the procedures for becoming a licence holder. These guidelines may also outline the qualifications which the bill sets out for being issued a licence, which include meeting and having the financial and human resource capacity to continue to meet minimum training requirements. Additionally, licensees must meet enhanced conduct standards including the requirement to act honestly, efficiently and fairly (discussed further below).

2.19 Authorised Deposit-taking Institutions (ADIs) will automatically qualify for a licence and it is likely that, by way of regulations, Western Australian brokers who hold an 'A' or 'B' class licence will be similarly 'streamlined', because of the rigour of the licensing scheme in that State.

2.20 A person who engages in credit activities after 1 July 2011 will need to hold a licence or they commit an offence.

[6] National Consumer Credit Protection Bill 2009 *Explanatory Memorandum* p. 27.

[7] National Consumer Credit Protection Bill 2009 *Explanatory Memorandum* p. 31.

Responsible Lending Obligations

2.21 Lending obligations arise when a licensee enters into a consumer credit contract, when they suggest a credit contract to a consumer or when they assist a consumer to apply for a credit contract. The key obligation is to ensure that they do not provide, suggest or assist with a credit contract that is unsuitable for the consumer. This obligation requires licensees to inquire reasonably and to verify a customer's financial circumstances so as to make an assessment that the credit contract will meet the consumer's requirements and that the consumer has the capacity to repay the contract.

2.22 Licensees must also disclose key details about themselves that will assist the consumer to understand with whom they are dealing, the costs they will incur and the dispute resolution services available to them.

2.23 Further, consumers will now be made aware of their right to request a variation in their credit contract in the event of financial hardship, rather than continue to suffer distress or seek to refinance their loan and exacerbate their debt levels.[8]

2.24 ASIC and consumers will be able to take action against a licensee for non-performance of the responsible lending conduct obligations. Breaches of these responsibilities can result in a range of criminal and civil sanctions.

Sanctions and Remedies

2.25 The bill sets out the remedies available to consumers, including remedies in relation to unlicensed conduct, the jurisdiction and procedures of the courts, and the dispute resolution mechanisms available to consumers.

2.26 The new framework is supported by a tiered approach to the sanctions regime, which includes:

- criminal penalties for licensee misconduct, including possible imprisonment for up to two years for those who lend contrary to the responsible lending requirements;
- civil penalties for licensee misconduct, which enables ASIC to seek fines of up to $220,000 for an individual and $1.1 million for a corporation;
- infringement notices enabling ASIC to act quickly to penalise certain breaches of the law; and
- consumer remedies, such as compensation, which allow consumers to seek redress for their loss and damage from a licensee.[9]

2.27 Importantly, the transfer of the regulation of consumer credit from the states to the Commonwealth will result in a change in the bodies which provide dispute resolution services and exercise jurisdiction under the new legislation.

[8] The Hon. Chris Bowen MP, *House of Representatives Hansard*, 25 June 2009 p. 3.

[9] The Hon. Chris Bowen MP, *House of Representatives Hansard*, 25 June 2009 p. 3.

2.28 The dispute resolution framework seeks to address any potential gaps between what matters can be heard by a federal court and state courts and tribunals, as well as the relative accessibility of the federal courts compared to their state equivalents.

Dispute Resolution

2.29 The bill provides for a dispute resolution framework that facilitates the transition of credit regulation powers to the Commonwealth and any new aspects of the overall regime. The framework is expected to assist consumers to obtain redress using a three-tier approach:

- firstly, consumers are able to access the licensee's internal dispute resolution process;
- secondly, if they are dissatisfied with the outcomes of the internal process, consumers may access the licensee's external dispute resolution scheme. Membership of an ASIC-approved external scheme will be compulsory for registration and licensing; and
- thirdly, consumers retain access to the courts to seek redress. Neither the internal nor the external process will remove a consumer's right to seek redress directly from a court (including a small claims procedure in certain circumstances).

2.30 This arrangement is in line with the trends to provide accessible, timely and cost effective dispute resolution processes. It also recognises that in cases of hardship or other consumer credit issues, a facilitated or negotiated outcome can be more favourable to a debtor than if it had been formally heard and determined under law.

2.31 The key policy objective of the amendments is to maintain accessibility to dispute resolution in terms of location, procedural simplicity and costs, taking into account the different jurisdictional context when transferring the regulation of credit from the states to the Commonwealth.[10]

National Credit Code

2.32 The National Credit Code will provide a consumer protection framework for consumer credit and related transactions and will be enacted as a Schedule to this bill. It largely replaces the UCCC and includes amendments to enable the UCCC to operate effectively in the Commonwealth context. The objective of the Code is similar to the UCCC, namely:

> …to ensure strong consumer protection through 'truth in lending', while recognising that competition and product innovation must be enhanced and encouraged by the development of non-prescriptive, flexible laws.[11]

2.33 The Commonwealth has specifically decided to enhance or extend the operation of the Code compared with the UCCC in the following ways:

[10] Notes from this section drawn from National Consumer Credit Protection Bill 2009 *Explanatory Memorandum*, pp. 118–125.

[11] National Consumer Credit Protection Bill 2009 *Explanatory Memorandum*, p. 239.

- it covers credit for residential investment properties, providing important protections to ‘mum-and-dad’ property investors;
- it increases the monetary threshold under which consumers can request a change to certain terms of their credit contract on the grounds of financial hardship from a fluctuating figure[12] of around $330,000 to a fixed figure of $500,000. The code includes a new, flexible power to raise this threshold if necessary…
- credit providers will be prohibited from using essential household goods as security;
- credit providers will be required to give consumers information when a consumer defaults on their contract or a direct debit is dishonoured; and
- as well, the code reduces the potential for unscrupulous lenders to avoid the application of the law to consumers.[13]

2.34 The Code does regulate many aspects of the provision of certain types of credit, including upfront and ongoing disclosure obligations, requirements for changing credit contract terms or terminating contracts, and penalties and remedies. The Code also regulates consumer leases.

2.35 Section 5 of the National Credit Code sets out the circumstances in which the Code will apply to the provisions of credit. Generally, it regulates the provision of credit where it is provided:

- for personal domestic or household use;
- to purchase, renovate or improve a residential investment property; or
- to refinance such credit.

2.36 The definition of 'credit' otherwise expressly excludes credit provided for business or investment use.[14]

National Consumer Credit Protection (Fees) Bill 2009

2.37 The National Consumer Credit Protection (Fees) Bill 2009 enables the imposition of fees, as taxes, for certain activities conducted under the National Consumer Credit Protection Bill 2009 and the National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009, such as the lodgement of

[12] The amount is set as 110 per cent of the average loan size.

[13] The Hon. Chris Bowen MP, *House of Representatives Hansard*, 25 June 2009, pp 7151-2.

[14] National Consumer Credit Protection Bill 2009 *Explanatory Memorandum*, p. 31.

documents (including applications for an ACL), or inclusion of a document in, or inspection of, a register maintained by ASIC.[15]

2.38 The approach taken in this bill is generally consistent with the *Corporations (Fees) Act 2001* which deals with the imposition of fees under that act.

National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009

2.39 This bill supports a smooth and comprehensive transition from the current state-based regulation of consumer credit to the new national scheme. A number of key elements in the bill facilitate this transition:

- it sets out the requirement for persons currently engaging in credit activities to register with the Australian Securities and Investments Commission (ASIC) prior to becoming holders of an Australian credit licence.
- it will substitute existing rights and liabilities under the state-based Uniform Consumer Credit Code with equivalent rights and liabilities under the National Credit Code;
- it will substitute existing court proceedings in train under the Uniform Consumer Credit Code with equivalent new proceedings under the National Credit Code;
- it provides that the National Credit Code does not apply to state or territory tribunal proceedings; and
- it grants functions and powers in relation to appeal, review or enforcement proceedings.[16]

2.40 Both this and the National Consumer Credit Protection Bill 2009 provide for a broad regulation-making power in recognition of the need for flexibility to deal with circumstances that may arise in the future. Such a power ensures that any necessary consequential amendments can be made without the need for the enactment of another act.

2.41 As a person (who is not acting on behalf of a licensee) who engages in credit activities after 1 July 2011 without a licence will commit an offence, it is expected that by this date, there will no longer be any need for transitional arrangements.

[15] The bill is a separate bill in order to comply with the requirements of section 55 of the Constitution. That Constitutional provision provides, in part, that laws imposing taxation shall deal only with the imposition of taxation, and that any other provisions dealing with any other matter must be dealt with separately. The Hon. Chris Bowen MP, *House of Representatives Hansard*, 25 June 2009, p. 5.

[16] The Hon. Chris Bowen MP, *House of Representatives Hansard*, 25 June 2009 p. 5.

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]

[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.
>
> 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.
>
> The regulations may describe other categories of participants who may also be streamlined to an ACL.
>
> 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]

[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]

[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]

[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

[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.**

[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.

[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.

[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.

[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.
>
> 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

[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:

[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]

[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

[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]

[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]

[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.

[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.

Chapter 4

Margin lending, promissory notes and trustee corporations

Introduction

4.1 At their 26 March 2008 meeting, where the Council of Australian Governments (COAG) agreed to nationalise consumer credit regulation, COAG also reached in-principle agreement that the Commonwealth would assume regulatory responsibility for margin lending and trustee corporations.[1]

4.2 The Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 contains the government's proposed measures to introduce responsible lending obligations for margin lending, establish a more consistent approach to the regulation of promissory notes and debentures and require trustee companies to hold Australian Financial Services Licences.

Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009

4.3 On 3 June 2008, the Government released a green paper which canvassed 'seven critical areas of Australia's financial services'[2] including trustee corporations, margin loans and promissory notes. The green paper received 76 submissions. On 7 May 2009, after further consultation with a panel of industry and consumer groups, an exposure draft of the Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009, plus draft regulations relating to margin lending, was released for public comment.

Interaction with the National Consumer Credit Protection Reform Package

4.4 Many of the issues addressed in the green paper are the subject of either the National Consumer Credit Protection (NCCP) reforms or this bill.

4.5 Significantly, the responsible lending obligations, which are an important part of the NCCP bill, will also be introduced into the *Corporations Act* and applied to providers of margin lending products, creating substantial cross-over between the two bills. Additionally, margin lending providers will be subject to new dispute resolution requirements, including a requirement that they be members of a registered External Dispute Resolution (EDR) scheme.

[1] Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 *Explanatory Memorandum* p 3.

[2] Treasury green paper, *Financial Services and Credit Reform: Improving, Simplifying and Standardising Financial Services and Credit Regulation'*, 3 June 2008 p. ii.

4.6 However, there are also some important differences between the regulation of marking lending, trustee companies and promissory notes and the regulation of consumer credit. These differences are explained in more detail later in this chapter.

Committee view

4.7 The Committee acknowledges that the responsible lending obligations which will apply to margin lending products as a result of this bill substantially reflect the obligations under the NCCP bills and that margin lending providers will have similar dispute resolution requirements. However, the Committee believes that there are other issues that must be considered in discussing the regulation of margin lending products because of their unique position as both a credit product and an investment product.

Margin Lending

4.8 The ASIC website 'Fido' defines a margin loan as follows:

> A margin loan lets you borrow money to invest in shares and other financial products, using existing investments as security. Borrowing money to invest in this way, also known as ‘gearing’, can increase the gains from an investment, but also multiply the losses. Margin loans are offered by a wide range of financial institutions and are often available online.[3]

4.9 Margin lending typically involves the investor borrowing funds (sometimes up to 80 per cent of the total value of a portfolio of listed shares, fixed interest securities and/or units in managed funds) to supplement an initial investment. Investors hope that the value of the overall portfolio will grow, increasing the equity in the portfolio. Investing using margin loans can also have taxation benefits.

4.10 However, as indicated in the ASIC definition, the risks involved with investing using funds from a margin loan can greatly exacerbate the risks associated with normal investments.

4.11 Typically, a lender will approve a margin loan for a consumer whereby the value of the loan amount cannot exceed a certain percentage of the loan's security. This is called the Loan to Value Ratio (LVR). When the value of the overall portfolio falls so that the LVR rises to greater than the level originally approved by the margin loan provider, the lender issues a 'margin call'. This requires the investor to return the ratio to below the approved level by giving the lender additional security, reducing the size of the portfolio (by selling some of the assets) or paying extra cash.

4.12 The money that investors borrow in a margin loan is generally backed by the securities or financial products owned by the investor (such as listed shares). In recent years, however, some lenders have encouraged investors to provide other assets, such as their home or investment properties as collateral.

[3] http://www.fido.asic.gov.au/fido/fido.nsf/byheadline/borrowing+money+to+invest+margin+lending?openDocument (accessed 29 June 2009)

4.13 In instances where a margin lender issues a margin call and the borrower is unable to bring the LVR down below the approved level, the borrower may be exposed to the lender calling in the margin loan.

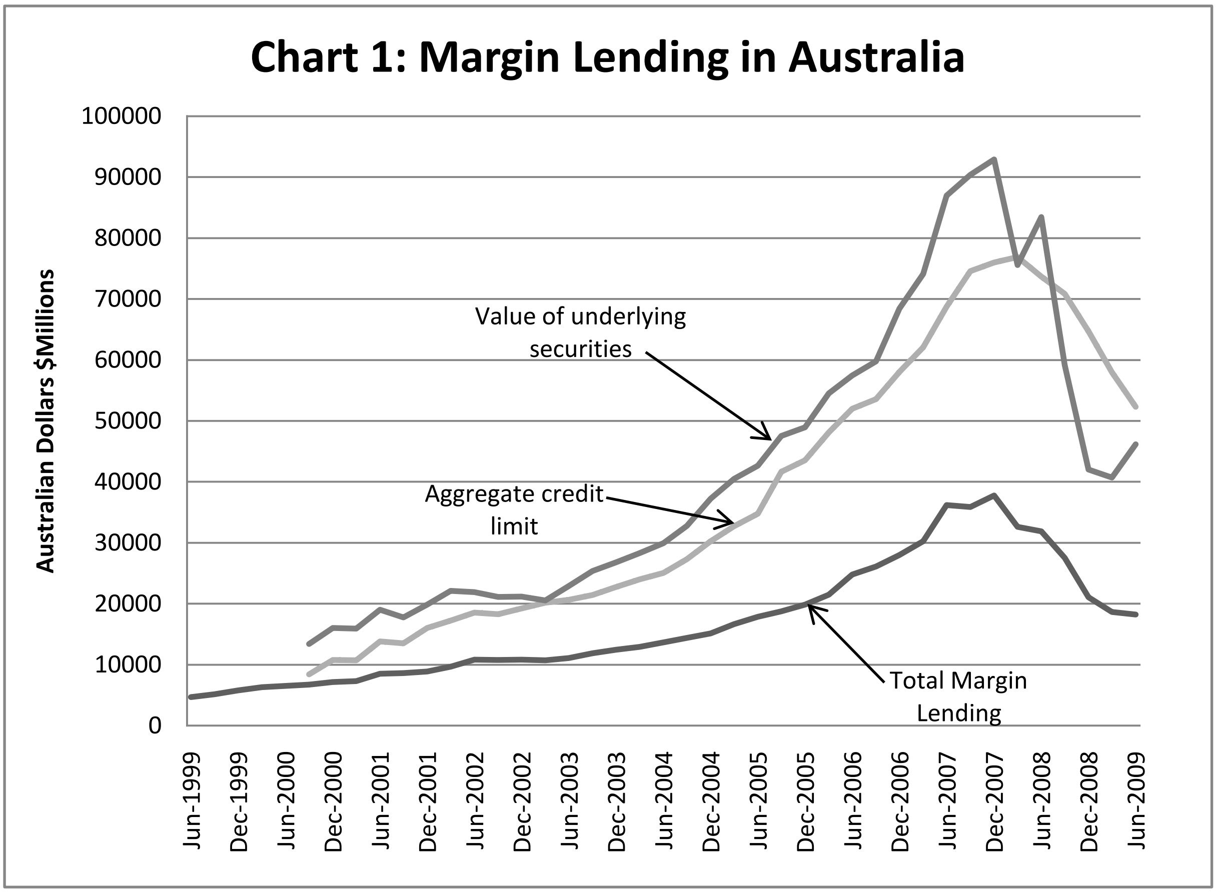
Margin Lending in Australia

4.14 In his second reading speech on 25 June 2009, The Hon. Chris Bowen MP said,

> Over the past 12 months, in the fall-out from several high-profile financial collapses, many investors lost hundreds of thousands of dollars due to margin loans. And in some cases, they even lost their family homes. While properly-geared margin lending, backed by full disclosure, does have a place in our financial services landscape, we cannot tolerate ordinary Australians being misled into grossly inappropriate margin loans that can cost a family everything they own.[4]

4.15 Chart 1 shows the substantial increase in how much investors have borrowed in margin loans since 1999. It also shows the 'aggregate credit limit', which is the sum of the lenders' approved loan limits, or the total amount lenders are willing to lend under margin loans. The value of the underlying security (the shares) is also depicted. The chart shows that, between December 2000 and December 2007, the proportion of total lending to the aggregate credit limit remained similar as the market for margin loans grew. Between December 2007 and December 2008, as the value of many stock market products fell, the total value of the securities used to back margin loans dropped below the aggregate credit limit, but not below the total borrowed. This chart shows aggregate figures. For some individual consumers, the value of the underlying securities may well have dropped close to the amount borrowed. In such instances, it is likely that a margin call would be issued (see Chart 2).

[4] The Hon. Chris Bowen MP, *House of Representatives Hansard,* 25 June 2009 p 5.



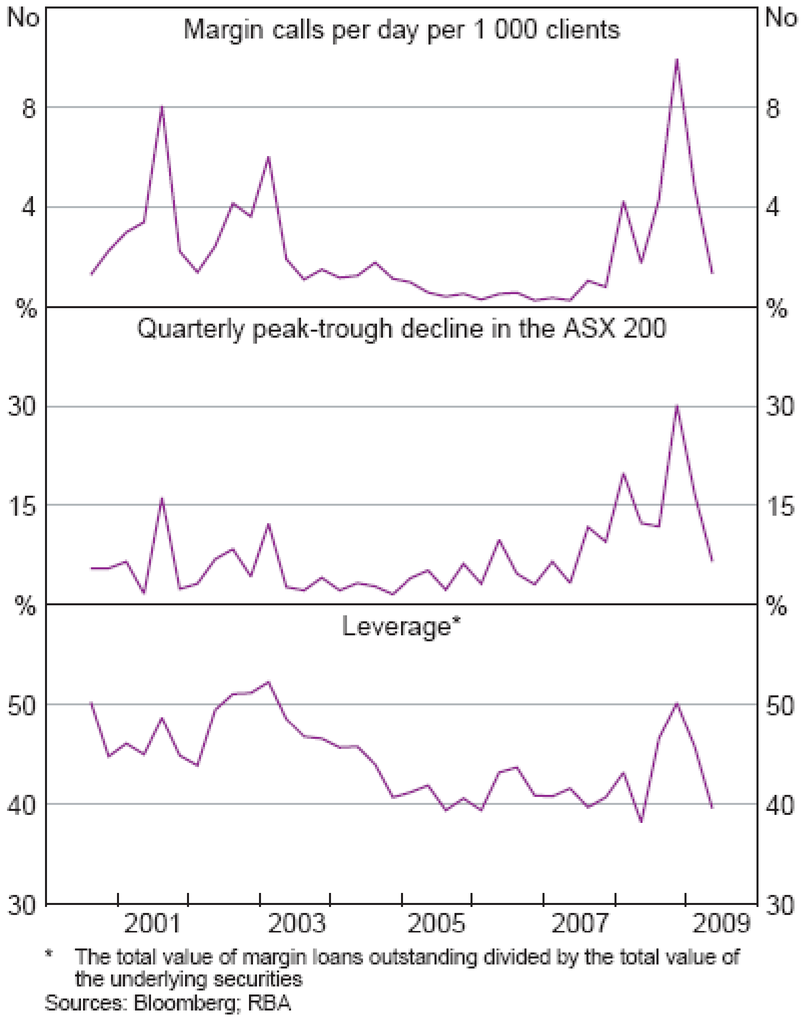
Source: Secretariat prepared from RBA Data – Margin Lending D10 – June 2009

4.16 According to the Reserve Bank, there were 199,000 margin loan client accounts in Australia in June 2009 (from a high of 206,120 in June 2008).[5] The tendency for significant downturns in the stock market to be correlated with higher numbers of margin calls is illustrated by Chart 2.

4.17 Considering the significant increase in the use of margin loans in times of economic growth and the potential for 'mum-and-dad' investors to be adversely affected by a downturn in the stock market, the lack of regulation of these products is of great concern.

[5] RBA stats D10 Margin Loans: http://www.rba.gov.au/Statistics/AlphaListing/alpha_listing_l.html (accessed 24 June 2009)

Chart 2: Margin Lending In Australia



* The total value of margin loans outstanding divided by the total value of the underlying securities

Sources: Bloomberg; RBA

Source: Reserve Bank of Australia – Statement on Monetary Policy August 2009

The proposed reforms

4.18 Margin lending has not been subject to any specific regulatory regime, at either the State or Commonwealth level. Treasury state:

> Margin lending facilities are not regulated as a financial product, or subject to Australian Securities and Investment Commission (ASIC) supervision relating to financial services. This is because the term 'financial product' in the relevant legislation does not cover credit products (such as margin loans) as a result of the current referral agreement with the States and Territories. Further, State and Territory legislation governing consumer credit (the Uniform Consumer Credit Code) excludes investment loans such as margin lending.[6]

[6] Treasury, *Supplementary Submission 56*, p 2.

4.19 Margin loans are a contractual arrangement between the lender and the client. Primary disclosure of the terms and conditions governing the loan occurs through the lending agreement signed between the two parties. As this disclosure is not currently regulated it is not clear that investors are fully aware of the risks associated with a margin lending product.

4.20 To address inconsistencies in the regulation of margin loans, the proposed legislation includes margin loans as financial products for the purposes of Chapter 7 of the Corporations Act 2001 (which regulates the provision of financial services supplied in relation to financial products, particularly for investment purposes). This will establish an investor protection regime by ensuring that margin loan providers will be subject to the licensing, conduct and disclosure requirements in Chapter 7 as well as supervision and enforcement action by ASIC.

4.21 The margin loan regulatory regime will only apply to margin loans taken out by natural persons, including persons acting as a trustee of a trust. This means that margin loans taken out by companies, including small businesses and family companies, will not be subject to this legislation. Treasury explain that this approach avoids any potentially inappropriate outcomes for large corporate borrowers.[7]

Evidence in relation to Margin Lending

4.22 The main issues raised in relation to margin lending were the inclusion of margin loans as a financial product in the *Corporations Act*, rather than in the consumer credit legislation, the introduction of responsible lending obligations for margin lenders and the treatment of margin call notifications within the bill.

Margin Lending's inclusion in the Corporations Act

4.23 Treasury explain that the main reason for including margin lending in the Corporations Act is:

> …that it provides key protections to borrowers such as access to free dispute resolution arrangements, disclosure of important information and assurance that margin loan providers and other service providers are appropriately resourced and competent.[8]

4.24 The Securities and Derivatives Industry Association (SDIA) highlighted their concern about the impact on their members of the inclusion of margin loans as a financial product:

> Whilst understanding why the government has taken these measures in regard to margin lending, SDIA has always struggled with the categorisation of the funding facility for the purposes of financial products as a financial product itself. Our members are now faced with new

[7] Treasury, *Supplementary Submission 56*, p 5.

[8] Treasury, *Supplementary Submission 56*, p 3.

> measures for disclosure and unsuitability tests which differ from other financial products.[9]

4.25 MinterEllison have argued that the proposed framework creates a significant discrepancy between how different investment products will be treated.

> The Government proposes to address other investment loans in phase two of its credit reform program. We understand that these will include loans secured by residential property mortgages to acquire investment products and securities. As these loans will relate to investment products and securities, the regulation of margin lending under the Modernisation Bill would suggest that they should be regulated under the Corporations Act. On the other hand, given they are secured by residential property, the Credit Bill would suggest that they should be regulated under that legislation. Neither result is entirely satisfactory.[10]

Licensing

4.26 The bill requires margin lenders to hold an Australian Financial Services Licence (AFSL). The Securities and Derivatives Industry Association have indicated that all their members currently hold an AFSL.[11] However, they also mention that:

> …amendments and variations to all licences will be necessary for those issuing or advising in margin lending, which will be most of our Members, and hundreds if not thousands of licensees across the industry. ASIC implemented an effective streamlining process in the lead up to re-licensing under FSR. We urge ASIC to streamline the necessary arrangements to facilitate the licence variation process during transition.[12]

4.27 In the June 2008 green paper, Treasury explain that one advantage of including margin lending in the *Corporations Act 2001* is the strength of the licensing regime and its administration by ASIC. They argue that any separate licensing regime for margin lenders would unnecessarily mirror those provisions and create regulatory overlap for businesses offering margin loans and other financial products.[13]

4.28 Treasury go on to say that inclusion of margin lending in Chapter 7 of the Corporations Act is considered to be the option which imposes the least regulatory burden on industry with respect to licensing.

> Most margin lenders and financial planners are already in possession of an Australian Financial Services License (AFSL) issued under requirements

[9] Mr David Horsfield, Managing Director and Chief Executive Officer, Securities and Derivatives Industry Association, *Proof Committee Hansard*, 24 August 2009 p 66.

[10] MinterEllison, *Submission 10*, p 3.

[11] Mr Douglas Clark, Securities and Derivatives Industry Association, *Proof Committee Hansard*, 24 August 2009, p 70.

[12] Securities and Derivatives Industry Association, *Submission 23*, p 3.

[13] Treasury, *Green Paper*, June 2008, p 32.

> specified in Chapter 7. Obtaining authorisation to issue or advise on margin loans will require a variation to an AFSL [however] this is a simpler process than requiring lenders and advisers to obtain a separate credit licence…[14]

4.29 MinterEllison have lodged an argument that a separate licensing regime should be established but concede that:

> …if the Government continues to insist that the credit licensing regime should be based upon the FSR licensing regime then credit licensing should be included within Chapter 7 of the Corporations Act.[15]

The Responsible Lending Obligations

4.30 As mentioned above, the new regulatory regime for margin lending also includes responsible lending obligations for margin loan providers.

> The main purpose is to require lenders before providing credit to make an assessment whether the product is unsuitable for the consumer. If the assessment considers that it is [unsuitable], then the loan may not be provided…
>
> While the majority of margin loans are not causing any problems for borrowers, there is evidence that in some cases borrowers have been given margin loans with features and risks that they did not fully understand.[16]

4.31 The bill includes a requirement that margin lenders do not provide a margin loan if the loan is unsuitable or the borrower cannot service the debt (or if servicing the debt would cause substantial hardship). The factors that lenders must consider are contained in the regulations.

4.32 The Securities and Derivatives Industry Association commented on whether financial advisors are in a position to make such an assessment.

> The adviser will have to address the matters set out in regulations as to whether the debt would be serviceable by the client. It would be more of a credit check like banks do: the source of funding for the equity that the client is putting in to make sure that that equity is not already encumbered and checking whether there are existing mortgages or other financing arrangements on that equity to secure the loan. These are checks that advisers do not normally make.[17]

4.33 The Financial Planning Association of Australia were less concerned about the ability of planners to assess the financial capacity of their clients. They were,

[14] Treasury, *Supplementary Submission 56*, p 4.

[15] MinterEllison, *Submission 10*, p 4.

[16] Treasury, *Supplementary Submission 56*, p 5.

[17] Mr Douglas Clark, Securities and Derivatives Industry Association, *Proof Committee Hansard*, 24 August 2009, p 70.

however, concerned that the responsible lending obligations only apply where the financial planner was genuinely providing credit assistance. They highlighted their concern about financial planners who provide 'incidental' credit advice.

> Financial planners assist their clients with strategies to identify and achieve short- and long-term financial and lifestyle goals… A vital part of the financial planner’s role is helping consumers appropriately manage debt and implement a savings plan… This is specifically not about making a recommendation about credit products; [but] they very clearly need to understand the debt and asset position of their client to be able to make suggestions about financial management.[18]

Margin Calls

4.34 Another important aspect of the bill is a provision which regulates the notification of margin calls to clients, especially where the loan has been arranged through a financial planner.

> There have been situations where it has been unclear whether it was the lender or the planner who was responsible for notifying clients when a margin call occurred. Failure to notify a client in time can result in losses for the client. The amendments require that lenders must notify clients when a margin call is made, unless clients explicitly agree to notifications being provided through their planner.[19]

4.35 The Financial Planners Association of Australia welcomed the additional safeguards contained in the legislation to ensure that arrangements to receive notifications through agents are only effected on client request.

> However, the sole notification of agents may be inappropriate in some circumstances. While the use of agents may be helpful in steady market conditions, it may be less appropriate at times of unusual market volatility, when agents may face a high volume of margin notifications, thus increasing the potential for delays in passing notifications on to clients. Where a quick response is required, it would be more appropriate for both client and agent to be informed.[20]

4.36 The Australian Financial Markets Association (AFMA), in indicating their support for a national regime to regulate margin lending, emphasised that:

> This necessarily includes procedures that support effective disclosure, proper margin call notification procedures and good lending practices.[21]

[18] Mr Deen Sanders, Financial Planning Association of Australia, *Proof Committee* Hansard, 4 August 2009 p 57.

[19] Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009, *Explanatory Memorandum*, p 14.

[20] Financial Planning Association of Australia, *Submission 7*, p 4.

[21] Australian Financial Markets Association, *Submission 37*, p 1.

Committee view

4.37 The Committee supports the Government's decision to include margin loans as a financial product in Chapter 7 of the *Corporations Act 2001*.

4.38 The Committee also notes that the Parliamentary Joint Committee on Corporations and Financial Services is currently conducting an inquiry into financial products and services, including the conduct of certain organisations with regard to margin lending.[22]

4.39 The Committee feels that, as most businesses who offer margin lending products already hold Australian Financial Services Licenses, the proposed licensing regime will impose less of a burden on the industry than would be imposed if an equally strong regime were established separately.

Trustee Corporations

4.40 Trustee corporations provide, among other things, 'traditional services' such as the administration of personal trust and deceased estates, including acting as a trustee of a trust, applying for probate of a will or acting as an executor of a deceased estate. Trustee companies that wish to operate in more than one jurisdiction (i.e. in different states) must comply with differing and often inconsistent authorisation and reporting requirements. This creates considerable burdens for many trustee corporations.

4.41 As explained in the Explanatory Memorandum:

> The private trustee company industry is relatively small with ten licensed private trustee companies. The majority of these trustee companies are licensed and operate in multiple jurisdictions.
>
> There are also eight public trust offices. These trustee companies have been regulated at an entity level under State and Territory regulatory regimes. As the majority of trustee companies operate in multiple jurisdictions, the need to obtain a licence in each individual State and Territory, combined with the lack of consistency in licensing requirements, creates barriers to entry and restricts competition in the marketplace.
>
> In order to offer funds management services, all of the private trustee companies hold Australian financial services licences (AFSLs). As a result, they are familiar with regulation by the Australian Securities and Investments Commission (ASIC) and the requirements of an AFSL.[23]

[22] Information about the inquiry can be found at: http://www.aph.gov.au/senate/committee/corporations_ctte/fps/index.htm (accessed 31 August 2009)

[23] Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 *Explanatory Memorandum* pp 33-34.

4.42 The bill introduces a requirement that both public and private trustee companies hold AFSLs.

4.43 The legislation also streamlines the dispute resolution process available to beneficiaries to enhance the protection available for trust assets. Currently, in the absence of internal dispute resolution services voluntarily provided by the trustee company, the Supreme Court is the only avenue of recourse for beneficiaries with concerns about the management of the trust or estate.

4.44 The Commonwealth is relying on its legislative power under section 51(xx) of the Constitution (which empowers the Commonwealth to make laws with respect to foreign corporations, and trading in or financial corporations formed within the limits of the Commonwealth) to make this law, rather than seeking a referral of power from the States.

Evidence in relation to Trustee Corporations

4.45 The Trustee Corporations Association of Australia (TCA), which represents all eight Public Trustees and the majority of the 10 private statutory trustee corporations, has welcomed the announcement that the Commonwealth would take over responsibility for the regulation of trustee companies. However, they highlight their concern about how the approach will work in practice with the Commonwealth:

> assum[ing] exclusive responsibility for 'entity level' regulation of traditional trustee company services, but existing State and Territory legislation, and the rules of common law and equity… continu[ing] to govern the functions and powers of trustee companies.[24]

4.46 The TCA are concerned that the bill does not introduce unnecessary duplication or hamper the objective of enabling trustee companies to carry out their activities as efficiently as possible.

Promissory Notes and Debentures

4.47 The bill amends the *Corporations Act* to create a consistent approach to the regulation of promissory notes to address issues that arose out of the collapse of the Westpoint group. Following Westpoint's collapse, the Government undertook a review of the regulatory regime for debentures, with the aim of protecting retail investors.

4.48 Westpoint group, a property developer, collapsed in January 2006 resulting in what ASIC estimates will be a total loss of $329 million for investors in the group's financial products.[25]

[24] Trustee Corporations Association of Australia, *Submission 52*, p 3.

[25] For more information on ASIC's response to the Westpoint collapse, see: https://westpoint.asic.gov.au/ (accessed 31 August 2009)

4.49 One of the main issues arising from the Westpoint case was the inconsistent regulation of promissory notes and debentures. Treasury explain:

> Promissory notes, a form of debenture and debt instrument, are used by the issuer to raise funds from retail investors. In return, retail investors receive interest on their investment. However, the current regulation of a promissory note differs depending on its value: promissory notes valued at less than $50,000 are generally regulated as debentures; at $50,000 or over, generally as financial products. This difference derives from distinctions between retail and wholesale investors incorporated in early 1980s legislation which is now considered to be anachronistic.[26]

4.50 Westpoint issued promissory notes with a face value of at least $50,000 in an attempt to obfuscate having the debt treated as promissory notes by ASIC and therefore having ASIC's jurisdiction over their compliance monitoring challenged. Because of the uncertainty, ASIC attempted to come to an agreement with Westpoint about the treatment of this debt. In a Senate Estimates hearing on 25 May 2006, ASIC gave the following evidence:

> There was an express exclusion [in the Corporations Act] for promissory notes over $50,000 from the definition of 'debentures'; that was the problem. We looked at what could be done given that that is what the situation appeared to be, that these were not covered by the legislation that we are tasked to regulate. We developed an argument that we thought had some merit and we thought we needed to raise directly with Westpoint to persuade them that what they were doing, which purported to rely upon the exclusion, did not in fact do so…
>
> It would be fair to say there was a lot of toing-and-froing between ASIC and Westpoint and in particular their lawyers, Freehills—they might say 'toing-and-froing'; we might say 'cat and mousing'—over this issue. We eventually realised by the end of 2003 that we were being stalled, we were being given the run around, and we delivered an ultimatum to Westpoint to either comply with the argument that we had put forward about the Corporations Act or we would take court action. We ended up taking court action to force Westpoint to comply with the Corporations Act, based on a very difficult technical argument that in part relied upon an interpretation of the Bills of Exchange Act rather than the Corporations Act. Nonetheless, we had to fight for our jurisdiction and that is what we did.[27]

4.51 The court finally determined that the issue took the form of an interest in a managed investment scheme (rather than a debenture that had to comply with the relevant debenture provision in the Corporations Act).

[26] Treasury, *Supplementary Submission 56*, p 13.

[27] Mr Mark Steward, Deputy Executive Director, Enforcement, ASIC, *Committee Hansard* 25 May 2006 p. 89.

The Proposed Reforms

4.52 The amendments proposed in this legislation seeks to improve regulatory certainty and clarify the law by amending the definition of debentures so that promissory notes valued at above $50,000 fall into the definition and therefore are subject to the same regulatory regime.

4.53 The amendments also provide for the establishment of a register of debenture trustees who will provide a level of investor protection for debenture holders. Only certain entities are permitted to undertake this role, as set out in Chapter 2L of the Corporations Act. Trustees' duties include those set out in the Corporations Act, as well as those in ASIC's guidelines on debentures. The guidelines emphasise the need for trustees to monitor the financial position and performance of the debenture issuer.

4.54 The amendments also aim to enhance transparency by providing for public access to the list of trustees, who are required under law to represent the interests of investors and undertake important responsibilities on their behalf.

Evidence in relation to Debentures and Promissory Notes

4.55 Treasury have indicated that, during the Government's consultation process with regards to this bill, there was broad support for this amendment as it would clarify the operation of the legislation and provide consistency.[28]

> In June 2009 the Government released for consultation the Green Paper… Twenty submissions were received in relation to debentures. While four possible reforms were canvassed, after discussions with ASIC regarding its forthcoming review of debentures, it was decided to proceed initially with only the promissory notes amendment…

Conclusion

4.56 The Committee welcomes the Financial Services Modernisation reforms contained in this bill.

Recommendation 12

The Committee recommends that the Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 be passed.

Senator Annette Hurley
Chair

[28] Treasury, *Supplementary Submission 56*, pg 13.

Coalition Senators' Additional Comments

Coalition senators support the national consumer credit package of legislation, but there are issues surrounding its implementation about which we make further comment.

In relation to the large number of recommendations by this committee, coalition senators feel the level of reservations about the bills as they stand to be implemented once again exposes the Rudd government's rushed legislation agenda.

Timetable indecision

The Rudd government has announced two significant changes to the timing of the start of the responsible lending provisions. On 25 June 2009, the government deferred the start date of the responsible lending provisions as planned during the consultation period by one year to 1 January 2011 and then on 14 August 2009, the Minister announced the date will come forward again to 1 January 2010 for mortgage brokers and lenders.

In this context, coalition senators are dismayed at the committee having to conclude from the evidence that there are grounds for all but the responsible lending provisions of the bill due to commence on 1 January to be delayed to 1 July 2010. Coalition senators suggest that government senators are loathe to put off the responsible lending provisions as they apply to credit providers other than ADIs and finance companies, in the knowledge that the government has already brought them forward from 1 January 2011.[1]

Although coalition senators lend our support to the recommendation for delay if necessary, we are wholly critical of the Rudd government for driving this agenda at a pace beyond the deadlines which businesses could feasibly meet and, moreover, seesawing between start dates. As has been commented in other reports this unseemly rush without giving time for stakeholders to prepare and adjust is becoming a typical modus operandi of the Rudd government

We appreciate that there is the added complication of a constitutional referral to add to the mix of factors weighing in on the legislation timetable, but it is not surprising that some smaller lenders may leave the business of lending altogether.

The government cannot fairly expect credit businesses to meet the requirements when it is changing the rules and the timetable on the run.

[1] Minister Bowen, media release 14/08/2008.

Point of sale finance

The second significant point coalition senators make relates to the government's ambivalence over the treatment of point of sale credit assistance, whether this credit-related activity by retailers is in or out, or merely has a reprieve until phase two of the reforms.

Although we recognise that new schemes of regulation almost by definition bring compliance burdens and transition insecurities, we consider that the uncertainty for retailers whether this applies to their business models, on top of the timetable uncertainty, is nothing short of reprehensible on the part of the Rudd government.

Coalition senators are aware, based on the evidence of Treasury and ANRA to the committee, that there is a schism between the government's intended scope of the draft regulations as they apply to point of sale retailers, and the view the retailers are taking, on advice, of their obligations under the main bill.

The government is driving an almost impossible agenda and is coming undone in the process.

Coalition senators call on the government to immediately clarify this issue for retailers.

Credit licensing

The financial services industry presented cogent arguments to the inquiry that the AFS licensing regime under members are regulated is more than adequate protection for the interests of the consumer and accordingly licensees should not be subjected to an additional licensing obligation.

Consultation

A number of submitters raised issues about the practical implications of some of the changes in the bills, which Treasury's evidence satisfied. Coalition senators consider it would have been preferable for the government to have advised stakeholders prior to the committee hearings that the matters raised were not real issues.

Senator Alan Eggleston
Deputy Chair

Senator Barnaby Joyce

Senator David Bushby

APPENDIX 1

Submissions Received

Submission Number	Submitter
1	Housing Loans Australia
2	SMART Compliance Pty Limited
3	Momentum Wealth
4	Confidential
5	Dun & Bradstreet Australia
6	Mortgage & Finance Association of Australia (MFAA)
7	Financial Planning Association of Australia Limited
8	Harvey Norman Holdings Limited
9	Commercial Asset Finance Brokers Association of Australia Ltd (CAFBA)
10	Minter Ellison
11	Challenger Financial Services Group
12	Credit Ombudsman Service Limited
13	Confidential
14	Aussie
15	Redfern Legal Centre
16	Bank of Queensland
17	CPA Australia Ltd
18	FSU Australia
19	David Jones
20	National Legal Aid
21	Brotherhood of St Laurence
22	Legal Aid Queensland
23	SDIA Securities & Derivatives Industry Association
24	Professor Gail Pearson
25	Australian Institute of Credit Management
26	Business Council of Australia
27	Optometrists Association Australia
28	City Finance Franchising Pty Ltd
29	National Financial Service Federation Ltd
30	Financial Ombudsman Service Limited
31	Mr Andrew Serpell
32	Confidential
33	Confidential
34	Confidential
35	GE Capital Australia & New Zealand
35	GE Capital Australia & New Zealand – Supplementary Submission
36	AAMC Training Group
37	Australian Financial Markets Association (AFMA)
38	Office of the Privacy Commissioner
39	Motor Trades Association of Australia
40	Abacus – Australian Mutuals
41	Consumer Credit Legal Centre (NSW) Inc

42 Confidential
43 ICAN Indigenous Consumer Assistance Network Ltd
44 The Law Society of New South Wales
45 Westpac
46 ACDBA Australian Collectors & Debt Buyers Association
47 Consumer Action Law Centre
48 Australian Bankers' Association Inc
49 National Australia Bank
50 Australian Institute of Company Directors
51 CARE Inc Financial Counselling Service and the Consumer Law Centre of the ACT
52 Trustee Corporations Association of Australia
53 Australian Finance Conference
54 State Trustees Ltd
55 Veda Advantage Limited
56 The Treasury
56 The Treasury – Supplementary Submission
57 Australian National Retailers Association
57 Australian National Retailers Association – Supplementary Submission
58 Mrs Maria Rigoni
59 Mr Darren Boehm

Additional Information Received

- Received on 3 September 2009 from the Australian Bankers' Association Inc. Answers to Questions on Notice taken on notice on Monday, 24 August 2009.

APPENDIX 2

Public Hearings and Witnesses

CANBERRA, FRIDAY 21 AUGUST 2009

BEALE, Mr Timothy, Senior Adviser
Department of the Treasury

GALLO, Ms Alix, Manager, Corporations and Financial Services Division
Department of the Treasury

MIKULA, Mr Christian, Senior Adviser, Corporations and Financial Services Division
Department of the Treasury

MILLER, Mr Geoff, General Manager, Corporations and Financial Services Division
Department of the Treasury

SEWELL, Mr Mark, Manager, Corporations and Financial Services Division
Department of the Treasury

SYDNEY, MONDAY 24 AUGUST 2009

BELL, Mr David, Chief Executive Officer
Australian Bankers' Association

BRADY, Mr John, Director
National Financial Services Federation

BROPHY, Mr John, Director
National Financial Services Federation

CHONG, Mr Seng Wing, Chair, Regulations Committee
Financial Planning Association of Australia

CLARK, Mr Douglas, Policy Executive
Securities and Derivatives Industry Association

DEGOTARDI, Mr Mark, Head of Public Affairs
Abacus-Australian Mutuals

EALES, Mr Damian, Group General Manager
Financial Services and Marketing, David Jones

FITZPATRICK, Mr Ged, General Manager, Policy and Government Relations
Financial Planning Association of Australia

GIJSELMAN, Mr Matt, Senior Adviser, Policy and Public Affairs
Abacus-Australian Mutuals

GILBERT, Mr Ian, Director, Retail Regulatory Policy
Australian Bankers' Association

HORSFIELD, Mr David, Managing Director and Chief Executive Officer
Securities and Derivatives Industry Association

JOHNS, Mr Philip, Chief Executive Officer
National Financial Services Federation

MOODY, Mr Terence, Vice President
Commercial Asset Finance Brokers Association of Australia Ltd

NAYLOR, Mr Phillip, Chief Executive Officer
Mortgage and Finance Association of Australia

OSMOND, Mrs Margy, Chief Executive Officer
Australian National Retailers Association

PEARSON, Professor Gail, Professor of Business Law, University of Sydney

REDMOND, Mr Mark, Chairman
National Financial Services Federation

ROBERTS, Dr Malcolm, Director, Policy and Strategic Development
Australian National Retailers Association

SANDERS, Mr Deen, Deputy Chief Executive Officer
Financial Planning Association of Australia

VENGA, Mr Raj, Ombudsman
Credit Ombudsman Service Limited

WILLIAMS, Mr Troy, Lawyer
Abacus-Australian Mutuals

SYDNEY, WEDNESDAY 26 AUGUST 2009

BOND, Ms Carolyn, Co-CEO
Consumer Action Law Centre

BRODY, Mr Gerard, Senior Manager, Financial Inclusion
Brotherhood of St Laurence

HITTER, Ms Monique, Director, Civil Law, Legal Aid NSW
National Legal Aid

LANE, Ms Katherine, Principal Solicitor, Insurance Law Service
Consumer Credit Legal Centre NSW Inc.

MORATELLI, Mr John, Senior Solicitor, Legal Aid NSW
National Legal Aid

RICH, Ms Nicole, Director, Policy and Campaigns
Consumer Action Law Centre

APPENDIX 3

5892

2008-2009

The Parliament of the
Commonwealth of Australia

THE SENATE

EXAMPLE

National Consumer Credit Protection Bill 2009

(Amendments to be moved in committee of the whole)

(#) Clause 128, page 133 (line 5), omit “A”, substitute “(1) Subject to subsection (2), a”.

(#) Clause 128, page 133 (after line 17), at the end of the clause, add:

(2) Subsection (1) does not apply if:

(a) the credit contract is a mortgage; and

(b) the assessment was made within 120 days (or other period prescribed by the regulations) before the credit period;

unless the licensee has reason to believe that an assessment made for the purposes of paragraph (1)(c) would assess the contract as no longer suitable for the consumer.

[extended settlement period for mortgages]

(#) Clause 130, page 134 (lines 15 to 28), omit subclause (3).

[verification of consumer’s financial situation]