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ECONOMICS LEGISLATION COMMITTEE

Reference: National Consumer Credit Protection Bill 2009

FRIDAY, 21 AUGUST 2009

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SENATE ECONOMICS

LEGISLATION COMMITTEE

Friday, 21 August 2009

Members: Senator Hurley (*Chair*), Senator Eggleston (*Deputy Chair*) and Senators Cameron, Joyce, Pratt, and Xenophon

Participating members: Senators Abetz, Adams, Back, Barnett, Bernardi, Bilyk, Birmingham, Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cash, Colbeck, Collins, Coonan, Cormann, Crossin, Farrell, Feeney, Ferguson, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, Marshall, Mason, McEwen, McGauran, McLucas, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Ronaldson, Ryan, Scullion, Siewert, Sterle, Troeth, Trood, Williams and Wortley

Senators in attendance: Senators Bushby, Cameron, Hurley and Pratt

Terms of reference for the inquiry:

To inquire into and report on:

National Consumer Credit Protection Bill 2009

WITNESSES

BEALE, Mr Timothy Gerard, Senior Adviser, Department of the Treasury 2

GALLO, Ms Alix, Manager, Corporations and Financial Services Division, Department of the Treasury 2

MIKULA, Mr Christian, Senior Adviser, Corporations and Financial Services Division, Department of the Treasury 2

MILLER, Mr Geoff, General Manager, Corporations and Financial Services Division, Department of the Treasury 2

SEWELL, Mr Mark Francis, Manager, Corporations and Financial Services Division, Department of the Treasury 2

Committee met at 3.12 pm

CHAIR (Senator Hurley)—I declare open this first hearing of the Senate Economics Legislation Committee inquiry into the national consumer credit protection reform package. On 25 June 2009 the Senate referred the National Consumer Credit Protection Bill 2009 and three related bills. The committee is due to report by 7 September 2009.

The bills implement a decision by the Council of Australian Governments to replace state based credit legislation with a national regulation and oversight regime. The reform includes the implementation of comprehensive licensing for people providing credit or credit assistance. Lenders will also be required to adhere to new responsible-lending obligations, which include an assessment of suitability and the consumer's capacity to repay the loan. Credit providers will be required to make reasonable inquiries to verify the details provided to them. The bills include new disclosure and dispute resolution requirements.

The inquiry will also look into the Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009, which brings margin lending into the Corporations Act as a financial product, regulates the traditional services provided by trustee companies and amends the Corporations Act so that all promissory notes issued to retail clients will be subject to the same regulatory regime as debentures.

These are public proceedings, although the committee may agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera. I remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as contempt. It is also contempt to give false or misleading evidence to a committee.

If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, the witness may request that the answer be given in camera. Such a request may also, of course, be made at any other time.

I remind members of the committee that the Senate has resolved that departmental officers shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions to superior officers or to a minister. This resolution prohibits only asking for opinions on matters of policy and does not preclude questions asking for explanations of policy or factual questions about when and how policies were adopted.

[3.15 pm]

BEALE, Mr Timothy Gerard, 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 Francis, Manager, Corporations and Financial Services Division, Department of the Treasury

CHAIR—I welcome representatives from Treasury. Would you like to make an opening statement, Mr Miller?

Mr Miller—I was not planning on making an opening statement. We have submitted to the committee two submissions on the two separate packages of bills. I thank the committee for allowing us this opportunity to answer any questions you might have on those bills.

CHAIR—I will start by asking you to go through the time line for the legislation. The Senate does have to vote on it in the next few weeks, so our inquiry is necessarily truncated a little. Could you run through why it is that we need to deal with it in the time frame we have been given?

Mr Miller—With the consumer credit bills, the first action that occurs commences on 1 November, which is the period in which lenders and other credit providers and credit assisters have to register for the new system. That registration period is for about two months. It is a fairly light registration system, but they only have two months to register. They then have a further six months to get their licensing, so that is from 1 January 2010 to 30 June 2010.

From 1 January 2010 everything pretty much turns on for consumer credit. You have all the requirements of the old UCCC turn on on 1 January. Not all of the responsible lending requirements but the high-level requirements for everyone other than banks and Australian finance companies are also turned on. There are some other measures that turn on a bit later. There are some improvements to the old UCCC when it is being brought across. Those improvements do not turn on until 1 July 2010. Then the full range of responsible-lending requirements for everyone turn on on 1 January 2011.

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. It would be preferable to get them through by 1 November but, if they cannot get them through by 1 November, they definitely need to have them 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.

Coming back to timings, if the bill passes the Senate, with or without amendments, by the end of the two-week September sitting period then we expect that most of the states will be able to do their references before 1 November and certainly all of them before 1 January. The problem will be if it goes much longer than that because the states have their own processes to go through plus there are their sitting times. At the end of their sitting period for this year there is a break before they sit again and some of them will not sit again well into next year and thus they could not get referrals passed well into next year. If that happened, we would have to set up another period for registration and licensing. 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. It would all be pushed back mainly because of the time it would take them to get it through their processes, because they do not sit continuously and it would be a matter of lining up with the states’ processes.

CHAIR—Is it the states and territories, or just the states?

Mr Miller—It is only necessary for the states to do it, but I understand that the territories will do it anyway.

CHAIR—What is the significance of 1 January 2010? Is that the date agreed through the COAG process?

Mr Miller—Certainly, COAG has signed off on those dates—that date and the other date, 1 July 2010, which is basically when everyone will be licensed by or have all lodged their licences by anyway. This timing fits with the COAG requirements and has been seen by COAG, which has agreed to those timings.

CHAIR—Does the second piece of legislation, the Corporations Legislation Amendment (Financial Services Modernisation) Bill, need to be concurrent?

Mr Miller—No, we do not have to have that bill attached per se. The main reason is that we do not need additional referral for those measures. We still have to go through ministerial council processes for amendments and things like that, but there is no referral required. As long as that bill is debated and finished sometime in this session then it would have no effect on the start times.

CHAIR—What have been the most strenuous criticisms in your consultation?

Mr Miller—To a large degree they have been around timing. That is why there has been quite a bit of movement over the period on when things start. There are two phases for these measures coming in. The first phase, which is what you have before you, is really just to move the old UCCC into a new national consumer code at a national level. Of course, if it were only that there would be hardly any criticism at all because that is what exists today, but on top of that some improvements have been made. Most of those improvements were already on the Ministerial Council on Consumer Affairs's table at the time that a decision was made to make these provisions. We have picked up the additional things that were already underway but had not been implemented. Obviously, anything additional has the potential for criticism or discussion.

The licensing requirements are new, and obviously that is something people have talked about. Then there are the responsible-lending requirements, which people have also been talking about. Those are the three things—the additional improvements, the licensing and the responsible lending—there has been a lot of debate about.

To some degree, the debate in the last number of months has been about timing. It has been submitted to us by a lot of the larger organisations—banks and large finance companies—that to gear up for the new responsible lending requirements will take them some time, both in computer capability and staff training. So we have had to look at the best way of turning on the various elements. On 1 January, we turned on responsible lending at a high level for everyone other than the banks and the large finance companies. We turn on everything for everyone on 1 January 2011. That is the timing there. With the additional improvements to the old UCCC we have deferred their start date by six months for everybody because they are new and there are things that—

CHAIR—And this is phase 2?

Mr Miller—No, this is still in phase 1. This is all phase 1. These are additional improvements that were on the ministerial council's agenda before they handed it over. Those ones which are going in will now start on 1 July 2010. So what we have done over that period is work with the various groups to try to find a reasonable way of doing it—reasonable from the point of view that we want everything to start as soon as possible, but reasonable also from the point of view that it has to be achievable with business in particular. That has caused debate. Consumer groups would like everything to start from day one, understandably. But the reality is that it will all come in. All the things that the consumer groups want in phase 1 will start; they will just start on a staggered basis.

There has been other criticism apart from the phase 1 work, and that is the fact that we have phase 2. Phase 2 has always been designed to take what we have in phase 1 and improve it, but a lot of these other issues are quite complex. One of the things to look at that has not fallen out of phase 1 but has been deferred from phase 1—which is effectively putting it into phase 2—is the retail point-of-sale issue. That is looking at what we do with people at the retail point-of-sale end of things. We have issues around certain aspects of credit card marketing. I know some of the consumer groups have brought up anti-avoidance questions—that is, have we got sufficient and strong enough anti-avoidance mechanisms in place? That will have to be looked at. Reverse mortgages is another one. There are a whole host of things that people, over the last number of years, have said need to go into a national system. The government does accept that and the government has announced that all these things will be looked at and discussed in some detail in phase 2.

CHAIR—So, in that roughly 12 months before phase 2 comes in, there will be this discussion.

Mr Miller—Yes.

CHAIR—Will you only be looking at those things that have already been identified, such as the retail trade, or, if there are some problems as you go along in phase 1, will it be possible to consider those during that consultation period as well?

Mr Miller—Absolutely. In our last meeting with our consultation group, we spent some time looking at the arrangements going forward. The arrangements are not to turn off phase 1, make the consultation arrangements and then turn on phase 2. We actually have a dual set of arrangements that we are proposing. A group will continue to look at phase 1 from both a transitional and an implementation point of view and we will have a separate group that starts working on the issues that are arising in the second phase. And we expect, yes, that there certainly could be issues still arising from phase 1 and we will have to sort them out along the way. So not only are we looking at new things to add to the system but we have to make sure that as we bed in phase 1 it is happening as we intended it to happen. If there are issues along the way that need fixing from phase 1, they will all be wrapped up together when the second package comes back.

CHAIR—As phase 1 starts, ASIC will bring in guidelines and regulations?

Mr Miller—Absolutely. ASIC have already started issuing some of those guidelines in draft form. They have put out a couple of draft regulatory guides already and I know they have another draft regulatory guide on responsible lending itself due to come out next month. I think they have actually issued a time line for when they are putting out those draft regulatory guides. The drafts will be out for about a month each before they finalise those guides, but the intention is that by the time the legislation is ready to go then all of their guidance will be ready to go at the same time. We will have the whole thing: we will have the legislation ready to go and, as you are probably aware, we have already put out regulations in draft form. We want the regulations ready to go and we want the guidance ready to go so everything is there to assist everyone in moving to this new system. Of course, ASIC have a whole education campaign lined up to surround the whole thing as well.

Senator BUSHBY—Thank you for coming along again today—it seems like only yesterday since I saw you! One of the things I am interested in, which came out of our briefing yesterday, relates to the responsible lending guidelines. We were discussing, I think in response to a question from Senator Pratt, how that would apply to the limit on a credit card. How would those responsible lending provisions apply to ongoing contracts? I think it is probably pretty clear if you take out a personal loan before the provisions start and the period of that runs after they start, it will probably have no application.

Mr Miller—Yes.

Senator BUSHBY—But what about situations like, for instance, a credit card where you go up and down in how much you owe without actually changing the limit, or where you have an overdraft or a home loan with an equity redraw facility or something like that: will it have any ongoing impact in terms of having to look at the borrower's ongoing ability to pay when they are actually dipping in and taking more money?

Mr Miller—The responsible lending requirements only happen at the point when the credit is extended to the person. If there is a change in that limit, it will happen again. But what I think you are referring to is where there is no change in that limit.

Senator BUSHBY—Yes, where there is no change in the limit, but in a contract where there is scope for it to go up and down.

Mr Miller—If you were granted a credit card with a $20,000 maximum limit, the responsible lending requirement would be applied to the fact that it is a $20,000 limit. If at the time you applied for it you could not afford to repay payments on that or it was unsuitable for what you were intending it to be used for, then that would breach the responsible lending requirement. There is no other ongoing requirement to keep going back and checking. You would only go back and recheck if in fact you were offering a higher limit on the card, for example.

Senator BUSHBY—What if the borrower's circumstances changed? Presumably if that does not come to the notice of the lender at all, then that would have no consequences because it would be unreasonable to expect them to know.

Mr Miller—Yes.

Senator BUSHBY—But if it was something where it could be deemed that they should have known or where they become aware of something which should trigger them to have another look, would there be any obligations on them to go to the extent of re-examining the ability of the borrower under the responsible lending guidelines?

Mr Miller—No regulatory requirement, no; but we have been talking quite extensively with some of the credit card issuers and it seems their practice is such that they do monitor the ongoing financial health of their client. In cases where they see that there has been maybe one or two late payments or things are starting to look like they are going wrong, they already have internal processes in place to go back to the client and work with them to either reduce the amount of outstanding credit they have or, if they are in fact in a hardship situation, put them into a hardship arrangement.

Senator BUSHBY—But in general under the proposed—

Mr Miller—The regulations do not require them to.

Senator BUSHBY—If information comes to their notice about somebody with whom they have entered into a lending agreement which suggests the person may no longer be in the position they were when they took the agreement on, there is no obligation on the lender to actually go back and review.

Mr Miller—No. There is no obligation, but from what I hear they do that almost automatically.

Senator BUSHBY—Obviously with their internal practices there would be other reasons—

Mr Miller—Yes.

Senator BUSHBY—But those exist currently upfront as well.

Mr Miller—In a practical sense that would be almost impossible to administer. It would be very difficult if every time you perceived there might be a problem you then had to ask the client for all this detail and all this information again. But we have quite good assurances from the card issuers that their internal practices are designed to—

Senator BUSHBY—I am not just talking about cards. Obviously we are talking about the whole scope of lenders that would be covered by this.

Mr Miller—Yes.

Senator BUSHBY—You have consulted widely. No doubt there have been all sorts of issues and objections raised with you during the course of that consultation. What stand out as things that people are still unhappy with from your perspective?

Mr Miller—It is hard to say. Most of the things that people have raised with us and that they say need doing are on our schedule to do in phase 2.

Senator BUSHBY—But that is from the perspective of people who are looking for consumer protection. What about from the other side? Have those who are being subjected to the regulations and who will actually have the obligations to comply with raised issues that Treasury have not managed to satisfy?

Mr Miller—I am not sure. We have attempted to satisfy all their requirements.

Senator BUSHBY—I am not suggesting that you have not. Quite clearly there is not anything that stands out, because you are having trouble putting your finger on anything.

Mr Miller—Nothing really stands out. You might get someone saying, ‘We need 90 days to provide that form and you’ve only given us 60 days,’ or, ‘We need 120 days.’ Then, after we talk it through and decide to change the legislation to, say, 90 days, they say, ‘That’s better, but it’s not as far as we want it to go.’

Senator BUSHBY—Is it, ‘We’ll have practical problems complying with it,’ or are they saying, ‘This will have a fundamental problem’? There is an example that the ABA has given us which I will raise. If a person is purchasing a house and they agree in the contract to a 120-day settlement, what is the relevance of your 90-day period?

Mr Miller—The relevance is that they do not have to retest for the responsible lending within that 90 days.

Senator BUSHBY—If the contract that they enter into goes beyond the 90 days, they may have to retest.

Mr Miller—They may have to retest.

Senator BUSHBY—Why is it ‘may’?

Mr Mikula—This was something that was discussed in the consultations. The 90 days was essentially a compromise position. A person's financial circumstances can change over a three- or four-month period. It was felt that 90 days was a long enough period and that if it was increased to 120 days there was a greater risk of their circumstances changing, creating a need to revisit the initial assessment to make sure the contract was still suitable.

Senator BUSHBY—Given what we discussed earlier about the impracticalities of testing, once it is all signed up, it is a falsehood in a sense if it is just because the contract has not been closed and the money handed over. You could be 89 days into the contract, hand the money over and everybody walks away, but the next day your circumstances could change. You would have been caught under the 120-day rule, but with this there is no obligation on anybody to ever have a look again even though your circumstances have changed. In the broader scheme of things you require there to be an upfront test, it is tested once and it does not matter what happens to their circumstances. In this case you have a practical consequence where a contract for settlement runs well beyond the period of the 90 days and yet you insist on it there. I can see that there is a difference; nonetheless in the broader scheme of things it is a pretty small difference.

Mr Miller—It is small, but we were hoping for something significantly less than 90 days. In a practical sense we accepted that this could happen. The question is: how many extend out to 120 days and how many fit within 90 days?

Senator BUSHBY—I have worked as a conveyancing solicitor for my sins in the past and I would say that there is a reasonable proportion—certainly not the majority—of normal household settlements that have long settlements usually from the purchaser's perspective. Most state regimes these days have stamp-duty complications if it runs over 90 days as well where, depending on the jurisdiction, they have to pay upfront and do all sorts of things. It is another additional complicating factor. It will add to the cost of a transaction such as that by having to get retested. It will be more work for the lawyer and others that they will have to pay for.

Mr Miller—This is a good example of why it was difficult for me to say whether there were any outstanding issues. To a large extent there are three major players who have potential issues here. You have the banks and the lenders generally then you have the intermediaries, which are the mortgage brokers and finance brokers, and you have the customer. On any one question each will have a different view of what is necessary or what is important. To some degree a lot of what we are trying to do is find the middle ground that everyone can be reasonably happy with, rather than one person be ecstatic and two people be very unhappy. As Christian said, in effect the 90 days became a compromise position. While the banks would have liked the 120 days and would rather still have the 120 days, they could probably live with the 90 days. They could not live with the 60 days that we had initially.

Senator BUSHBY—As you say, I am sure the banks are not happy with the 90 days. Ultimately, as is the nature of these things, I imagine it would be the consumer who ends up paying for the retest or the additional legal work that may be involved.

Mr Miller—The responsible lending requirements are there to protect the consumer.

Senator BUSHBY—But ultimately where you draw that balance line may involve additional costs for those particularly at the margin and make it that much harder for those who were marginal in the first place.

Mr Miller—There is a question also of how much the retesting would take. The only thing that may have to be retested in 90 days is just to check their income level, which might mean providing us with another earning certificate. That might be all that is required to ensure that the test is still being maintained. There is a question about how much cost is really involved in that retesting after 90 days.

Senator BUSHBY—Once again putting on my hat as a conveyancing solicitor, the solicitor will have a checklist for the conveyance and they will have a new box on there which says, 'Does the contract extend for more than 90 days?' Then there will be, 'Has there been a retest under responsible lending guidelines' That will be another hour's work for the lawyer that will be billed to the client for the lawyer's checking off, ringing the bank and making sure that it has all been done and it is all squared away. Anyway, we will not focus any further on that. The ABA has raised concerns that under this scheme the states retain the power to pass credit laws. Is that correct?

Mr Miller—In theory, and that is exactly the same with the Corporations Law and in many areas. There are two aspects. This is a technical constitutional issue. These are what they call displacement provisions. It allows

the states to pass a law in contravention of our law, but I think we then have the right to pass a law overriding that.

Senator BUSHBY—So the issues that arose with the UCCC, where you had a nice code that everybody agreed to initially and then it splintered off into all sorts of different directions, are not likely to occur here because of the way it has been set up.

Mr Miller—They are not likely to occur. We have had exactly the same provisions in the Corporations Law ever since that was around. These are more technical issues and, yes, technically they could do that. Technically they can withdraw their referral and just go it alone. That is always possible too. So, while there are all these technical arguments, I am aware that most of the states and territories will be withdrawing totally from this space, including resources and staff. It is a highly unlikely scenario.

Senator PRATT—The Consumer Action Law Centre have made a submission to the committee, and they have raised a number of issues that they believe need to be changed. Are you familiar with some of the arguments that they have put?

Mr Miller—Yes, they have been on our consultation group as well.

Senator PRATT—They have advocated a provision in the bill that expressly provides for the provisions in clause 3(1) to apply to insurance contracts. We have also had evidence this morning from Legal Aid—

Mr Miller—Is this the one on the other bill?

Senator PRATT—Sorry; I have just gone to the wrong one. They have one here on the same one. Sorry; I have marked that out. I beg your pardon. They have:

Amend section 80 of the National Consumer Credit Code to provide for a time limit of either two years after the relevant contract has been rescinded, discharged or otherwise comes to an end or within six years of the day the relevant contract was entered into or changed, whichever is the later …

Have you considered that particular proposal?

Mr Miller—Yes, they have raised that with us as well, and that is an issue. Part of the process in phase 1 was to make as few changes as possible to the UCCC when bringing it across as Commonwealth legislation in order to minimise the disruption. That was the basic approach taken, and so, while it might only be a change in a time limit, it was not really something that was part of that initial commitment. But it would be looked at in phase 2. It is not something on the merits of which we are able to express an opinion.

Senator PRATT—At this point. They have also raised the issue of the new hardship variation and licensing requirements applying to existing contracts. I understand the difficulties of bringing in existing contracts, but I wanted to know formally what your response is, particularly in relation to hardship.

Mr Miller—We certainly have the new hardship arrangements in these provisions. They do only apply from contracts entered into under these provisions. The bottom line is that there was a constitutional issue and that we could not apply it retrospectively. Our advice from the Australian Government Solicitor was that to do it retrospectively certainly was highly likely to breach the Constitution in respect of acquisition of property. I am not a great lawyer myself, but that was the bottom line. We would be effectively acquiring property from the state. The argument goes something along these lines: the banks, or whoever the existing hardship arrangements applied to, were not aware that they would have this additional liability, and we would actually be imposing retrospectively an additional liability, which would seem to be—

Senator PRATT—You are, in effect, changing the contract after the event.

Mr Miller—That is right. We are unable, constitutionally, to go back and apply it to previous arrangements.

Senator PRATT—Would solicitor lending credit activities be exempted? The Consumer Action Law Centre have argued that they should not be.

Mr Mikula—There is an exemption for solicitors in the regulations. It would exempt them not where they are lending but only where they are undertaking their usual professional activities. Certainly that is the intention of it. Regulation 23 of the National Consumer Credit Protection Regulations provides an exemption, but we do not regard it as exempting solicitors when they are lending. Certainly it is not the intention of it that they should be treated as similar or be equivalent to all other lenders, provided they fall within that. We have also had the benefit of direct discussions with the Consumer Action Law Centre and invited them to make specific submissions on that topic if they think that—

Senator PRATT—It has not been adequately addressed.

Mr Mikula—the regulation in draft form does not achieve that objective.

Mr Miller—Clearly, we have to do something. Otherwise, every time a solicitor gets themselves involved in a loan contract under normal solicitor work they will be dragged into the system, and you cannot have that.

Senator PRATT—You need to be able to distinguish.

Mr Miller—But if they are operating as a lender themselves, which some do, then they will have to be licensed like any other lender.

Senator PRATT—With respect to responsible lending practices, how does the bill manage lending that is guarantored? I am not sure whether the bill covers this or not. How is that assessed when the lender has required a guarantor? Does that give any added flexibility to responsible lending?

Mr Mikula—The requirement does not specifically address it or in any way differentiate between where there might be a guarantor to the transaction and where there is not. The obligation is still on the lender to make reasonable inquiries and make that initial assessment that the borrower has the capacity to repay and be satisfied of that. You can, nevertheless, take a guarantee where you might feel the need to do so for internal reasons.

Senator PRATT—So it must still meet that benchmark of responsible lending.

Mr Mikula—Yes.

Senator PRATT—On that basis, would you expect to see a reduction in the requirement for guarantors?

Mr Miller—I do not necessarily think so. The capacity to repay is not the same test that banks carry out now. Banks are obviously very concerned about the protection of the money and that if something goes wrong they can get their money back. Guarantors are about that. The capacity to repay test is quite different. It is about whether the person taking out a loan has the capacity to repay the loan. I do not think this is applicable unless the banks are currently lending to people who do not have a capacity to repay and are only doing so because they know they have a guarantor. When I am talking about the major lenders, I do not think they—

Senator PRATT—Banks might not be the ones at greatest risk of that.

Mr Miller—When I am talking about the major lenders, I do not think the major lenders are. Some of the more fringe lenders might do that and that might affect them, yes.

Senator PRATT—I think that the Consumer Law Action Centre gave an example that was solicitor lending, where that certainly seemed to be the case.

Mr Miller—But they cannot get around the capacity to repay test just by having a guarantor.

Senator PRATT—No.

Senator CAMERON—Mr Miller, we have had a confidential submission from a not-for-profit organisation raising concerns about the effect that the legislation may have on their arrangements with their members to provide an affinity card. Are you familiar with this argument?

Mr Miller—We are indeed, and we have done something about that.

Mr Mikula—There is a specific exemption in this version of the regulations that was not in the package that went out in April that exempts affinity cards where the organisation has a benefit of membership. That is, as part of signing up you get the opportunity to enter into a specific contract. As part of the operation of the organisation they have negotiated some arrangement with a particular credit provider to make, typically credit cards or a home loan, available at some sort of discounted rate. The intention is that the lender will still be caught in that situation but where the organisation only has a role in providing this package as part of the membership benefits, then it will be exempted, and that is regulation 19(7).

Senator CAMERON—I suppose that these submissions that are most critical would be from GE and to some extent the Business Council of Australia. The Business Council of Australia talk about regulatory overreach and that any legislation should be proportionate, effective and targeted. This is echoed in the GE submission, which talks about the legislation being a disproportionate response and a one-size-fits-all approach. These are big organisations. What are your comments on that?

Mr Miller—I suppose it depends how broad their criticism is. We have provisions in the law or the regulations about scaleability, for example, and on the conduct requirements required to be applied under the new national credit code. There are actually provisions there about scaleability—and maybe you can explain a bit more about scalability.

Senator CAMERON—Briefly, I hope.

Mr Mikula—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, the steps you need to take to meet them, will be significantly less.

Senator CAMERON—So this is not a one-size-fits-all approach, is it?

Mr Miller—At a principle level, yes. At a practical level—

Senator CAMERON—But at an operational level, it is not?

Mr Miller—No, that is right.

Senator CAMERON—The other argument from GE is that there is a lack of competitive neutrality. Has that been looked at?

Mr Miller—I would have to see where they believe that—

Senator CAMERON—They are arguing that the regime creates a competitive bias in favour of particular products. Then they go on to talk about a direct versus intermediary model.

Mr Miller—I have just been advised that it might be that they have some concern about leases.

Senator CAMERON—This is their second part. There are two parts, a direct versus intermediary business model, and credit contracts and consumer leases. Could you take that on notice and have a look at that and provide some advice to the committee on those aspects?

Mr Miller—Sure. We could answer the one on leases now.

Mr Mikula—The issue in relation to leases derives again from the commitment to bring the credit code across from a state to a Commonwealth law more or less as is. Consumer leases were treated significantly differently in the code for historical reasons—for example, there are much less onerous disclosure requirements; in particular, there is no requirement to disclose commissions. I think, from recollection, that was one of GE's concerns. Given the approach taken to bring the code across it was considered that bringing leases, which do operate slightly differently and the obligations are not readily translatable in all cases, was something to be looked at in phase 2.

Mr Miller—The leases side of it is scheduled for phase 2, but we can come back to you on that first issue that they raised.

Senator CAMERON—Okay, thanks. Maybe you can answer this question now. GE claim that the bill will have a significant adverse impact on the economy if it becomes law. They are saying it will inhibit consumer spending, resulting in job losses at a time when the government is stimulating growth.

Mr Miller—I understand that their submission was specifically about the view of what we might do with the retail point of sale and how that would affect the people on the shop floor being able to provide credit. We recognised that the work we had done up to the stage when we put the bill in was not sufficient and was not robust enough to make it work properly. That is why 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 without having those sorts of effects you are mentioning. Certainly GE and others will be well and truly integrated into that consultation arrangement.

Senator CAMERON—The other critique they make is that there are substantial increased costs with no demonstrated net public benefits. That is a value judgment we will have to make in terms of the evidence, but I think that would link in substantially to their argument that 12,000 retailers and hundreds of thousands of staff would have to be retrained. That is not the case, is it?

Mr Miller—No. The reality is that we have exempted what we call referrers, so if they are just saying to somebody, 'Go to this person and get your loan from them,' they do not have to fall into the system. We have to work through these issues with the retail point of sale, but it might be at any store there is one person who is the go-to person to do the loans, or there might even be a phone line that the person is put on to to make the loan arrangements. The quote they have got is that every store employee will have to be licensed and trained. I cannot say that is not the case, because we have not actually come out with what we are going to do, but that is certainly not the intention and it is clear that we would not want a situation like that.

Senator CAMERON—David Jones, for example, advised they use Amex. If David Jones sell a fridge and a washing machine and they say, 'Okay, you're going to get credit, so go over to the office there and someone will help you,' then under David Jones's position that would be an Amex person. They would have to be licensed, wouldn't they?

Mr Miller—That is exactly right, or it is a David Jones person who works with Amex to do this for Amex on their behalf. They would either have to be licensed, or licensed under the Amex arrangements.

Senator CAMERON—Is there any idea of what length of training would be required to achieve a licence to this?

Mr Miller—This is part of the discussion. We did try to develop something for retail point of sale and have it for phase 1. We got a fair way down the track but there was clearly still a lot of issues to resolve, and not enough was resolved to put into this bill. The question about how much training they need is one of those big issues. It depends on what their task is and what the job is.

Senator CAMERON—Because there could be two phases to this. When you get sent over to fill the forms in, somebody hands you the forms and checks to see whether all the boxes have been ticked. The form might then go by fax to an assessor.

Mr Miller—Yes, to the lender, that is right.

Senator CAMERON—Would the form gatherer and checker be a licence requirement?

Mr Miller—Probably. They will not necessarily have to have a licence in their own right. They may be underneath the lender's licence. The amount of training that they would require is something we have to determine. It is part of the arrangements in phase 2.

Senator CAMERON—Treasury must be concerned about the growth in the credit and the problems that can create in the economy if it continues unabated. So this is a good social piece of legislation that has economic implications as well.

Mr Miller—Indeed, yes.

CHAIR—I have a question regarding banks, particularly regional banks that operate as a central organisation and then there is almost a franchise like arrangement underneath that. How would that work in terms of licensing and disclosure? Would it be the bank on the ground that offers the credit or would the parent bank have some liability as well?

Mr Mikula—There are broadly two options available in that situation. The most likely one is that the head bank would get a licence in its own right and appoint the others as credit representatives rather than them all holding individual licences. But the system is designed to be flexible in that way.

Mr Miller—Those other ones could also be licensed in their own right.

CHAIR—If they chose to be.

Mr Miller—If the bank involved decided that was the way they wanted to do it.

CHAIR—Similarly, with the dispute arrangement, they could choose to have that at the bank or the parent bank. How would that work?

Mr Mikula—Irrespective of the model there would be a similar outcome in that case in that each licensee and each credit representative needs to be a member of an EDR scheme.

Mr Miller—That is probably one of the differences. We did not just make the licensee, the one who had to be a member of the external dispute resolution scheme. We actually required all the credit representatives to sign up as well. It allows the dispute resolution schemes and the clients more access to those schemes. If someone is saying, 'This is not us, you have to go to this person,' they are already signed up and the ability to target someone is easier.

CHAIR—What sort of cost is involved in signing up to this external dispute resolution system?

Mr Miller—I am not sure of the exact cost, but it is a couple of hundred dollars.

Mr Mikula—There is a sliding scale, so it would depend on the number of employees. It is certainly fairly minimal. There are two schemes likely to be available: the Credit Ombudsman Service and the Financial Ombudsman Service. It is in that field.

Mr Miller—For an individual it is around $200 or $250. I do not know the exact amount.

CHAIR—A year?

Mr Miller—Yes. It is fairly small.

CHAIR—All right.

Senator PRATT—I have one quick, last question. I wanted to canvass the issue of penalties. One particular submitter argued that they are 'excessive'. I am not personally going to pass opinion on that. But what they did also say, which is what I want to ask you about, was that it does not create any incentive for an institution to confess or disclose any breach that it might have made and to move towards rectifying it by identifying and examining their own practice. They argue that it is counter to what are currently some of the most effective aspects of the Uniform Consumer Credit Code that allow institutions to identify breaches of the code. Could you comment on that for us, please.

Mr Miller—We do not have compulsory breach reporting. We do not require people to compulsorily declare that they have done something wrong. There are penalties in place—

Senator PRATT—I know you do not require it, but I suppose what these submitters are saying is that currently, where they do actually do that, the penalties would be a disincentive to that current practice.

Mr Miller—Generally, penalties are not a disincentive for doing the right thing. It is also about how the regulator uses the powers that they have. Obviously, there are a range of penalties. Maximum penalties are quite severe, but regulators rarely apply maximum penalties to anyone, particularly for a minor breach. I know, just from talking with ASIC, that they are going to be—certainly, while it is all being bedded down—very conciliatory as far as ensuring that they have a more educational role than that of a regulator with a big stick, because people have got to understand and learn what they are meant to be doing. But, even once it is under way, their response generally, as it has been in the past, would be proportionate to the offence. In minor cases they are more likely to just try to help them to make sure it does not happen again; for repeat offenders, how much of a penalty they try and apply starts ramping up.

Senator PRATT—You put that in terms of whether the penalty is suitable to the offence, which I suppose is where I started in raising this issue, but these submitters actually argue that they would view some of the penalties outlined in the bill as 'excessive 'and therefore they certainly would be a disincentive to going, 'Whoops; we actually might have made a mistake here and we need to rectify it.'

Mr Miller—We had a look at that between an earlier version of the bill and the version of the bill that is here now, and we have significantly reduced—about halved—the penalties.

Senator PRATT—So, if this submission says there are 'criminal sanctions and civil penalties including up to five years prison and fines of $1.1 million for even very simple breaches', would that be before or after those changes?

Mr Miller—The penalties in regard to unsuitability were certainly reduced. Most of the other penalties were not reduced, but they are in line with what is in the Corporations Act—so we have pretty much lined it up with existing penalties.

Senator PRATT—Okay.

CHAIR—I think that is the end of the questioning. Thank you to Treasury for coming in this afternoon.

Mr Miller—Thank you very much.

Committee adjourned at 4.13 pm