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FBAA Submission on the National Consumer Protection Bill 2009

The Finance Brokers Association of Australia Ltd (the FBAA) thanks the Treasury for providing an opportunity for the FBAA to assist in the Consultative Industry Committee to Treasury, and to respond to the request for comment on the proposed Bill.

The FBAA being established in 1992 has today grown to being the peak industry body for all sectors of finance broking in Australia, with our members being complaint to rigorous standards of industry compliance and training, together with the FBAA having the highest standard of successful outcomes for Internal Dispute Resolution (IDR) in the industry, in conjunction with its members whom must also hold accreditation with an External Dispute Resolution body (EDR).

It is unfortunate due to the tight time frame imposed for the making of submissions, the FBAA has not had the opportunity to canvas all its members for their views and as such this submission must be read accordingly.

GENERAL COMMENTS

1. Consultation period

At the outset the FBAA notes that of course it is a matter for the government to stipulate a period for 'public' consultation on draft package. With respect, we observe that the exceptionally brief period in this case has meant that we have not been able to put together extensive comment on the significant impacts that the Bill is likely to have, and to consider exhaustively in any unintended consequences or drafting irregularities, however the FBAA's comment and input during the confidential Treasury Industry Consulting Committee process has been tabled throughout this period.

We must also note that our members have noted a number of matters which are contained in the specific comments below.

2. Licensing obligations and timing

The FBAA notes the extensive licensing and registering obligations that will be attached to credit providers and brokers under the exposure, and that the FBAA anticipates that some fringe credit providers, and some unrepresented credit providers at Treasury Industry Consulting Committee level, and many finance brokers would need to undertake a significant degree of procedural, documentation, computer and other changes in order to achieve compliance by the relevant dates.

No doubt affected credit provider groups will be able to provide further comments on the time necessary to achieve compliance, and we query whether it would be appropriate to confirm with them that sufficient time is provided during both the consultation process and transitioning provisions to ensure that diligent credit providers will have sufficient time to ensure that adequate compliance arrangements are put in place.

The FBAA notes that many previously raised concerns along these lines with the FSR and UCCC legislation prior to their introduction, and it subsequently proved necessary for significant amendments to be made in order to make the relevant regimes workable. In the latter case, this process was aided by emergency transitional regulations drafted by key stakeholders some months before the commencement of the legislation.

As a consideration we suggest that there be a post implementation review undertaken of phase one at the same time as work was being undertaken under phase two of the UCCC change program and the FBAA would be happy to be involved in a facilitation of this consultation concerning the post implementation review.

3. Licensing obligations

The FBAA notes that there is a significant change of philosophy regarding the regulation of credit between that contained under the licensing provisions of the package and the provisions of the Consumer Credit Code. For example, under the Code a breach of a key requirement need not be disclosed to ASIC and the maximum penalty is \$500,000 whilst under the licensing provisions there is an obligation to disclose significant breaches of the Code and penalties of up to \$1.1 million.

The FBAA queries whether these two philosophical approaches can easily mutually co-exist. As a practical matter it may be that the licensing provisions would themselves bear the weight of the day-to-day practical regulation credit rendering the Code provisions of significantly less meaning than they currently have.

Another practical example of this is that under provisions of the licensing obligations it is possible for the license to be revoked or suspended which arguably means that the credit provider or finance broker is stopped from performing its contractual obligations under its existing contracts (for example, continuing credit contracts) and has no ability to preserve its loan book by enforcing or even merely receiving repayments.

The FBAA queries whether this is the intention of the package as a whole and if it is, administratively what steps could be taken in the circumstances where an extension or revocation were contemplated.

SPECIFIC COMMENTS

1. LIC257 relates to a corporate credit representative sub-authorising individuals. There is a further requirement for individual appointments to be notified to ASIC. This was also struck when FSR was introduced and discovered that it unintentionally captured a large number of clerks, cashiers and other workers who were not actually performing financial services. To improve the practical application of the sub-authorisation and ASIC notification requirements, the FBAA suggests that the regulations clarify that staff of a credit representative who provide 'factual' information only or refer consumers to other sources of information and advice be deemed not to be providing credit assistance.
2. R130 and R230 deal with licensees providing credit guides. The exposure draft is silent on whether the same guide may be produced to cover both the credit assistance situation (R130) and the credit provision (R230). It would assist licensees if it were made clear that disclosure documents, giving all required information, may be combined. This would also reduce the volume of literature given to the consumer and reduce repetition.
3. R330 deals with credit guides for credit representatives. The exposure draft is silent on whether the same document may be produced to cover both the requirement to give the licensee's (or licensees') credit guide(s) and the credit representative's guide. Authority to combine these documents would reduce the volume of literature given to the consumer and reduce repetition.

4. With all these items the devil is in detail and still some parameters not yet quantified. We suggested that ASIC liaise with FBAA on such matters as to meet any training and compliance obligations, well-planned co-ordination implementation steps will be necessary.
5. The FBAA also notes the extension of the Bill to include credit provided to individuals for the purchase or renovation of residential property, for investment purposes. While the FBAA supports the intent of this extension to protect 'mum and dad' residential property investors, it may capture some commercial lending activity as well, purely because of the way a particular transaction is structured. While borrowing for business purposes is exempt, there are occasional cases where the test would be met and certain mortgage transactions caught, that are in effect, commercial loans. For example, borrowing by a high net worth individual for purchase of an apartment tower, or multi-townhouse complex. These types of transactions occur on occasion in some mortgage trusts which are designed to lend for commercial transactions. It would have the effect of capturing mortgage trust responsible entities in this regime, based on only a small fraction of their loan books.

The FBAA queries whether regulating transactions of this type are intended. The FBAA would recommend implementing a Corporations Act style 'sophisticated investor' test so that the consumer protection aims of the regime would be met but would not unnecessarily extend the regime to large transactions of a commercial or sophisticated nature. A capped loan size of \$1 million would seem appropriate to protect consumers while avoiding any unintended consequences. If a monetary cap is thought not to be adequate, perhaps it would be preferable to adopt the 'sophisticated investor' test with FSR to release credit providers from these requirements to provide disclosure etc.

CONCLUSION

The FBAA would like to thank Treasury for providing the opportunity to make this submission on behalf of our members, and we look forward to continuing our Industry Consultation with Treasury into Phase Two Implementation and beyond.

Yours sincerely



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