

FAST ACCESS FINANCE PTY LTD A.C.N. 078 233 084

The Manager
Consumer Credit Unit
The Treasury

SUBMISSION ON NATIONAL CONSUMER CREDIT PROTECTION BILL 2009
May, 2009

DEF5 - Credit Activity: The table depicting what is a credit activity states in various places that credit activity includes “performs the obligations” and “exercises the rights” in respect of the various aspects caught under the Bill. The examples given at pages 9 and 10 of the commentary go some way to indicating what activities are to be caught by these phrases. However, if a person makes a determination that they do not need to be licensed, and are wrong about that, then they can be liable to civil penalties of 2000 penalty units and criminal penalties of 200 penalty units and 2 years imprisonment.

It is unconscionable to have both a hefty penalty and a loose, subjective definition. This is especially the case where, from all evidence presented to date, the procedure to become licensed will neither be a frivolous, inexpensive or quick matter. Interested parties will shortly need to make an involved decision of whether or not they need to become licensed. The repercussions of getting that wrong (in either direction) will severely affect their business' viability, and themselves personally in the matter of imprisonment.

We understand that the penalties proposed are significant for a particular reason. Accordingly, DEF 5 must be sufficiently precise to all but eradicate the chance of a person making an incorrect decision about the need to obtain a licence.

Further, it is clear that the act of collecting monies owing on existing loans falls under the definition, and therefore requires a licence to be held. What provisions will be made for existing industry participants who wish to exit the industry but are not able to collect and finalise their loan books before the date by which licensing is required? Loan terms may run into multiple years even if they do not run into default. If they are leaving the industry, it is unfair to expect them to go to the time and financial burden of becoming a licensed operator simply to collect what is owed to them. The only available options that they will otherwise have are to cease collection and write the loans off, or to find a licensed party who is willing to purchase the loan book off them. Neither of these options is generally financially advantageous. It is, of course, illegal for a lender to call in the loan ahead of schedule without the loan being in default.

DEF8 - Intermediary: This definition is very wide, and may inadvertently catch parties that may not have been considered. Because an intermediary must be licensed or risk civil and criminal penalties (as above); once again this is a provision that requires greater certainty.

INT & DP - State Referral Provisions: This part of the Bill, while incomplete and requiring action by the States, is disturbing to industry. The Minister's repeated comments throughout the process of creating the Bill were that there would be one consumer credit regime throughout Australia, and that was a major selling point to both industry and consumer groups. However, the construction of this part makes it clear that

the States retain the ability to create legislation over consumer credit in certain circumstances. How can the Minister claim national consistency when there are provisions in the Bill specifically allowing States to reserve powers? Rather than providing one national regime and making things easier for everybody, this actually creates an extra regime on top of the existing State regimes as each State may enact separate and distinct instruments. This extra regime will make it more onerous for industry to provide services, and ultimately drive cost up which will have to be absorbed or passed on to consumers. Given the expected level of compliance, any business that chooses to absorb the costs will be greatly financially affected, necessitating a passing on to consumers.

A prime example of this is the issue of State based interest rate caps. The Minister commented to the media recently that the existing caps in Queensland, New South Wales and Victoria will remain; and the construction of the Bill points to that eventuality (and a possibility that they will remain indefinitely). In Queensland and New South Wales, where the cap is inclusive of fees and charges, this creates a situation where small amount, short term lenders who are already struggling to turn a profit will now be lumped with licensing provisions, compliance costs and extra administration. The net effect of this is the likely mass exodus of service providers from this sector. Aside from the job loss and decreased cash flow in the community, it will severely affect the livelihoods of the investors in the industry who are often “mum and dad” participants.

LIC165 - Classes of Licence: Sub-section 6 states that ASIC must ensure that the licence is subject to a condition that specifies the credit activities or classes of credit activities that the licensee is authorised to engage in. Where are these classes set out? Further, what happens where a person is required to be licensed but does not fall into one of the set classes? Further disclosure is required here before sufficient comment can be made.

LIC170 - Conflicts of Interest: Sub-section (1)(b) requires adequate arrangements in regards to conflicts of interest. How exactly is it proposed that this be accomplished? It is inimical to the relationship between lender and consumer that there are opposed interests. Even in the broker and consumer relationship there is bound to arise the opportunity for a conflict in that the broker is taking instruction from the consumer and receiving payment from the lender. This provision creates a situation where it may be impossible not to be in breach.

The commentary at page 40 states that this is only in regards to a conflict of interest at law, but the framing of the section itself does not provide for this. Further, the commentary states that where the section may operate (the first example given), then the broker must take “reasonable steps” to alleviate the matter but no indication is given of what these steps may be.

LIC175 - Compensation Arrangements: Lenders have still not been provided with any applicable example of when it would be practical for them to have such an arrangement (predominantly through obtaining professional indemnity insurance). This is aside from industry speculation that at this point there are no providers of such insurance that cover our activities. In most, if not all, cases where a lender would be required to compensate a borrower for loss or damage this would be achieved through

the court reducing the loan balance. Having the insurance would be a useless endeavour.

Further, in the restricted situation where a court would order that the lender could recover no further monies and have to reimburse the borrower, it is our opinion that the breaches necessary to arrive at that point would cause the lender to fall outside the area of coverage provided by any insurer; once again making the holding of insurance a useless endeavour.

Anecdotal evidence from other credit industries that are currently subject to professional indemnity insurance requirements have revealed that their insurers have quoted up to a 300% increase in premiums because of the new legislative regimes. This will mean that obtaining the insurance for lenders will become a costly exercise as well as being pointless.

LIC186 - Obligation to Notify ASIC: The requirements under sub-section (3) are fairly subjective as to when a licensee should be giving a report to ASIC, but the penalties given under sub-sections (1) and (2) are hefty. This will likely lead to a situation where licensees will be overcautious and begin reporting matters to ASIC that are not intended to be reported on. While ASIC may consider that this is an advantageous situation, it will place further cost on licensees as collating and reporting will be a time consuming matter.

Further sub-section (4) states that a licensee is only likely to contravene an obligation where they are no longer able to comply with the obligation. Therefore, why isn't "likely to contravene" changed to "no longer able to comply" for the sake of clarity? It is superfluous to have both when they mean the same thing.

LIC195 - Citing of ACL: The requirement to cite a licensee's ACL requires further consideration in the matter of advertising. Many lenders operate as separate entities under umbrella groupings (ie franchises) where many independent licensees will advertise under one name. This will lead to a situation where all advertising must quote every ACL number. For a lending group that runs into the hundreds of licensees, this will prove almost impossible.

LIC250 and LIC257 -Credit Representatives: Credit representatives will include employees of lenders on the basis of definition of duties. Sub-section (4) of LIC250 and sub-section (6) of LIC257 provide that the person must be a member of an approved external dispute resolution scheme. Is it intended that the representatives must have their own EDR membership, or is it sufficient that they are included under the licensee's membership?

LIC260 and LIC275 -Credit Representatives of Multiple Licensees: The operation of these sections will create a massive burden on business in terms of paperwork. An example of this is where a lender uses the services of a licensed debt collector to outsource some of their collection operations. That debt collector may provide services for another nine lenders. Under sections LIC260 and LIC275, this would mean that there must be cross authorization between the 10 lenders giving specific consent for each and every other lender. This creates 90 distinct consents that must be produced. Further, these 90 consents must all be conveyed to ASIC within 15 business days.

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Multiply this out by the number of instances that may arise and it becomes a burdensome exercise.

Further, if one of those lenders refuses to give their consent in respect of any of the 90 permutations then that debt collector is precluded from providing services in that respect. In that circumstance, the debt collector may be unfairly impacted because of a disagreement between two lenders, when really it does not practically affect the way in which services are provided to either of them.

LIC350 - *Financial Records Obligation:* In addition to simply keeping the records, the provisions require that they “explain the transactions and financial position” of the licensee’s credit activities. There is no indication given in the Bill or the commentary of to what degree it is required that the records give any such explanation and further information is required.

Further, if the licensee outsources some record keeping duties to a third party (such as a bookkeeper or an accountant) are these parties expected to comply with the Bill’s licensing and EDR regimes?

R130 and R230 - *Credit Guides:* These provisions state that a credit guide must be given to a consumer “as soon as practicable after it becomes apparent to the licensee that it is likely to provide credit assistance to a consumer” [emphasis added]. If this is a strict requirement as to timing, it will be impractical and onerous. Many small lenders will be better placed to give the guide to consumers before it becomes apparent that they will make the loan. The time between making a decision to lend money and actually lending it can be as short as several minutes. If the requirement is strict as to timing, then the lender has only a tiny window of time in which to comply.

Instead, if the lender was able to provide the guide at the time of filling in the application, for example, then this would accomplish the same outcome for the consumer and not overly burden the lender.

Further, the provisions are silent about how a guide is to deal with matters that are not relevant to the particular guide.

If the guide provider conducts business with more than six credit providers, the guide must state the names of the six that licensee conducts most business with. However, no guidance is given as to how these six are derived; is it in terms of dollars earned, the volume of deals or some other factor?

Sub-section (2)(e) requires information about commissions by disclosing both dollar amounts and methods of calculation. Some forms of commission cannot be quantified until some point well after disclosure, so it is often not possible to provide the dollar figure. Further, some forms of commission are very complicated and derived with regard to other transactions and loans done; how will this co-dependency be dealt with?

Further, some lenders place their employees on bonus structures that are earned through their conduct with borrowers and loan books at points down the track. For example, an employee may achieve a bonus if 100% of the forecast loan repayments for

the month are received. These commissions may not be on-charged to the borrower. Are these required to be disclosed under the credit guide?

Sub-section (2)(f) references EDR requirements and provides that the licensee must give the consumer information about the consumer's rights under the scheme. As all EDR schemes that licensees may use must be approved by ASIC, surely there are minimum rights and standards that would apply. Accordingly, what sense does it make in have to disclose these in a guide when they are not relevant to the consumer at that point in time. Simply stating that the licensee is a member, and disclosing the name of the scheme, should be sufficient. In the alternative, isn't the EDR scheme itself better placed to provide this information to the consumer? (perhaps through a prepared document that licensees could provide with the guide).

The provisions in regards to statements that must be made about compensation arrangements and not providing unsuitable products surely amount to "red flagging". These are both legislative requirements, so it's not a case that a licensee can opt out of them. The disclosure of these is not pertinent at the time of applying/entering into a loan product. It is irrelevant to require statements about how they comply with the law, when it is a simple fact that if they are legislated, they must comply with the law.

R135 - Quotes for Credit Assistance: What if the provision of credit assistance is free?

The quote given must specify a maximum amount payable, yet there is no recognition that the maximum can be tied to a specified scope of work. It is unfair if a quote is provided for X and Y, and is then not permitted to be increased if the consumer requires X, Y and Z.

The provisions do not provide for amounts that may be payable to credit providers, but which are unknown at the time at which a quote is required to be given, or that may change in between giving a quote and becoming payable. In those circumstances, the quote may need to be revised upwards.

Under sub-section (5) the licensee cannot demand payment before the assistance is provided. In some cases, a credit provider may require payment of an amount before providing finance (ie up front application fee) that is something the licensee is handling as part of the credit assistance. Is it therefore required that the licensee must outlay on behalf of the consumer for something they cannot recoup until after they have provided the assistance?

R165 and R190- Unsuitability: Sub-section (1)(a) contains the term "substantial hardship" but there is no guidance given as to what this is supposed to mean. For example, is this taken in isolation to the circumstances that the consumer will be in after the provision of credit, or may it be compared to the situation they are in before the credit is provided? Is it taken by simply looking at the level of debt and what is required to service it, or can the benefit derived from the provision of credit be factored into the assessment? Even then, what is the benchmark test to be used to derive what is "substantial hardship"? There is a substantial penalty of up to 2,000 penalty units for getting it wrong, so sufficient materials must be given to licensees to enable them to make a correct determination.

Sub-section (1)(b) requires that to be not unsuitable; the credit must meet the consumer's requirements and objectives. However, what if the consumer's requirements and objectives are beyond the serviceability of their station? In such a case, is it unsuitable for the licensee to provide credit to them that only satisfies a proportion of these but is serviceable? If it is, then there is very narrow scope for lenders to provide credit to people whose requirements and objectives match their ability to service the product. In many cases, consumers have to settle for less than they may be expecting. If the provisions are strictly determined, then these consumers may find themselves without any credit.

In terms of re-financing (R192), what of the situation where it is both unsuitable to a consumer to stay in their current product, and to move to a new product? Is the licensee required to withdraw from providing assistance at all for fear of breaching the provisions?

R170 - Provision of Assessment: There is no time limit for which the assessment may be required to be given. Theoretically, the consumer may request the assessment at any time in the future and the licensee must provide it. A time limit should be imposed. Further, two business days in which to provide it may be insufficient. This is particularly the case where a number of years may have elapsed since it was prepared and the licensee may have to retrieve the document from archived records. This is increasingly onerous, as the licensee may not even recover administrative expenses in providing the assessment.

R180 - Fees and Commissions: Previous mention was made of commissions to employees under R130 and similar comments apply here.

In sub-sections (2)(c) and (d), it is entirely possible that the disclosing party does not know the total amount of fees and charges the consumer may be liable to pay. In that case, how are they supposed to disclose it? In the circumstance where a broker is providing that information, it may relate to a number of credit products. In that case, the length of the disclosure may be inordinate.

Also, if the lender is the licensee providing the credit assistance, the matters referred to in sub-sections (2)(a), (b), (c) and (e) are required to be stipulated in the credit contract. Having to also disclose them under this section only creates further paperwork.

R270 - Giving the Assessment to the Consumer: This section creates a "chicken and egg" issue. The section provides that the licensee must, if requested, give the assessment to the consumer before entering into the contract. However, the note provides that it is not necessary to provide it if the contract is not entered into. Which requirement, therefore, prevails?

Sub-section (2)(b) references the time period for giving the assessment to the "expiration" of the credit contract. What does this specifically mean? It could refer to the end of the term of the credit, or when the credit is paid out (often two completely separate dates).

Also, see the comments under R170 about having only two business days in which to provide the assessment.

R280 - *Commissions:* Requiring the provision of such a document is an unnecessary double up. Under section 15(14) of the Code, the credit contract must set this out. That disclosure should be sufficient.

R330 - *Representatives:* Since representatives includes employees and directors of a corporate licensee, it is completely unnecessary for these people to have to provide a credit guide. As a simple rule, a party should only be required to give a credit guide where the consumer is required to make payment to that party. Otherwise, there is absolutely no net benefit to the consumer in receiving a credit guide from all and sundry.

Sub-section (c)(iii) could make the document massive as the scope of activities that the representative may perform could be long and involved. It serves no benefit to the consumer to receive a list of tasks of the representative down to minutiae. If it is that necessary, a brief overview of the areas that the representative has authority to conduct should be sufficient.

REM120 - *Compensation Orders:* There is no indication given of what the court should refer to in determining the level of compensation to provide, or whether it is in excess of, or comprised with, the orders the court may make about reductions to the credit outstanding.

C100 - *Small Claim Proceedings:* Capacity is only made for consumers to take action through the small claims proceedings avenue. This is inherently unfair to both licensees and consumers where the licensee may initiate court proceedings. If a licensee seeks to begin court proceedings, not only must they seek it through a higher court but the consumer must be prepared to defend that action in that court; at a higher cost to both parties. Where rights are given to the consumer to commence actions in small claims jurisdictions, the same right must be given to licensees.

Specific Code Sections

s6(1)(b)(ii) - *Credit to Which the Code Applies:* The part of this provisions ends with “or”, instead of “and”. The implications of this is that the Code applies to credit by a provider in the course of business to a natural person or strata corporation for; personal, domestic or household purposes, or to purchase, renovate or improve residential investment property, or a charge is made.

This would mean that where any credit is provided with a charge involved (ie lending to purchase commercial property), then it would be caught by the Code. This is outside the ambit of what the legislation is trying to accomplish. Accordingly, the “or” should be changed to “and”.

s46 - *Prohibited Securities:* The provisions allow security to be taken over purchased essential household property only by suppliers of those goods or linked credit providers. Many small credit providers who are not linked with suppliers provide credit to consumers for the purchase of such goods. To remove their ability to seek redress against the good, which they have provided the funds for, is unfair. Further, to restrict the ability to do so to one class of lender and not another fails to make any sense.

s66(2A) - *Hardship Provisions:* If a debtor's hardship application is not allowed, the credit provider must provide details of their EDR scheme and the debtor's rights. Elsewhere in this document, discussion is made of who should be providing details of the rights under the scheme. However, here, there is no acknowledgement that the debtor must go through the credit provider's internal dispute resolution process first before turning to EDR, which will cost the credit provider money. It is not clear whether the hardship application is concluded to be part of the IDR process. Further clarification is needed here. If it is not, then specific rules should be included requiring it.