



Investment & Financial Services Association Ltd

ACN 080 744 163

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Consumer Credit Unit  
Corporations and Financial Services Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Email: [consumercredit@treasury.gov.au](mailto:consumercredit@treasury.gov.au)

Dear Sir/Madam

**Re: Exposure Draft National Consumer Credit Reform Legislation**

We welcome the opportunity to provide comments on the public exposure draft of the National Consumer Credit Reform legislation and associated commentary.

The Investment and Financial Services Association (**IFSA**) is a national not-for-profit organisation which represents the retail and wholesale funds management, superannuation and life insurance industries. IFSA has over 145 members who are responsible for investing over \$1 trillion on behalf of more than ten million Australians. Members' compliance with IFSA Standards and Guidance Notes ensures the promotion of industry best practice.

IFSA makes the following comments in relation to the proposed Consumer Credit Reform legislation.

**1. General**

IFSA notes that it is the intention of the *National Consumer Credit Protection Bill 2009 (Credit Bill)* to introduce simple, standard, and national regulation of consumer credit. It is, therefore, disappointing to note that:

- the Commonwealth credit legislation is not intended to exclude or limit the concurrent operation of any law of a State or Territory (clause ^DP5);
- a State or Territory could effectively erode at some time in the future national objectives of the Bill by simply making a declaration that a matter is an excluded matter (clause ^DP10) and legislating a displacement provision at the State or Territory level (clause ^DP15).

It, therefore, appears to industry that no guarantee exists that a single, simple and national regulatory scheme will exist in the future. IFSA members are concerned that the legislative basis for this new national regime could result in credit providers effectively being subject to double regulation at the State and Commonwealth level, should a State or Territory wish to further regulate this area. This would adversely impact efficiency and lenders' costs.

## 2. Scope – Wholesale / retail distinction

IFSA notes that the proposed National Consumer Credit Code (**Code**) intends to capture consumers that borrow to invest in residential property. It appears that such credit contracts will be captured under the regime even where a significant amount of money is borrowed and the consumer is considered to be 'a sophisticated investor' under the *Corporations Act 2001* (Cth) (**Corporations Act**).

IFSA is concerned that there is no clear distinction between 'retail clients' and 'wholesale clients' of residential property investors. The Bill should in our view include such a distinction and apply in the same manner as the *Corporation Act 2001* (Cth) (**Corporations Act**).

### Recommendation

That the Consumer protection provisions of the Credit Bill apply only to retail investors and that the Corporations Act definition of retail investor be incorporated into the Bill.

## 3. Licensing

IFSA notes under the Credit Bill that where the holder of an Australian Financial Services licence (**AFSL**) engages in credit activities it will be required to be separately licensed as the holder of an Australian Credit licence (**ACL**) to carry out credit activities. In addition, we note that the Credit Bill does not include a process for streamlining AFSL holders into the ACL regime. While we note that some steps have been made to ameliorate the impact of the dual licensing requirement it does not result in an efficient and can result in unnecessary duplication.

IFSA is pleased to note that the Australian Securities and Investments Commission (**ASIC**) will issue a single licence number to a licensee who is both a holder of an ACL and an AFSL. IFSA would have preferred the issuance of a single licence upon which the services covered under the licence would be detailed, thus helping to produce a seamless financial services regime.

### Recommendation

That the Credit Bill:

1. provide for the licence of an AFSL holder to be endorsed to carry on credit activities where it is involved in the provision of credit or credit services; and
2. include a process for streamlining AFSL holders into the ACL regime. This could be done through a regulation under LIC157 or through administrative arrangements by ASIC.

## 4. Credit Guide – Multiple Credit Guides

The Credit Bill sets out separate requirements in relation to the provision of a credit guide for credit assistance providers, credit providers, credit providers who are assignees, credit representatives and debt collectors.

In addition, IFSA notes that if a financial planner were to determine that he/she is likely to provide a financial service to a consumer which might include 'credit assistance' or to 'enter a credit contract with a consumer' then the representative must provide in terms of the requirements of the Corporations Act and Part 3.3 of the Bill at least 6 different disclosure documents, including:

- provide a credit representative credit guide (^R330);

- a credit provider credit guide (^R230);
- a financial services guide; and
- where the planner can enter into the credit contract on behalf of the credit provider (^14 Code):
  - a pre-contractual statement; and
  - an information statement.

IFSA notes that the Credit Bill does not set out whether credit guide must be a stand alone document or whether it can not be included as part of another document.

IFSA is concerned that the multitude of disclosure documents will create confusion for consumers, particularly where there are many parties involved in the provision of credit and is unnecessary. While IFSA recognises that it may not be possible to combine the credit guides into one credit guide in all circumstances, it should be possible for them to do so where appropriate.

#### **Recommendation**

The Credit Bill should:

1. expressly permit ACL holders required to give credit guides to combine credit guides with other credit providers (where appropriate);
2. provide that a representative of a licensee which has both an ACL and an AFSL be able to provide one disclosure document (as with section 942C of the Corporations Act) which provides details of the licensee and representative and allows the incorporation of both credit and other financial products and services to satisfy the obligations to provide both a Credit Guide and FSG; and
3. make it clear that ACL holders are only liable for the part of the credit guide that relates to them, depending on their level of involvement with preparation of the credit guide.

#### **5. Credit Guide –Reliance**

IFSA notes that the Credit Bill does not permit an ACL holder to rely on another person to give a credit guide.

IFSA notes that under the Corporations Act, an AFSL holder will not be required to provide a customer with a PDS where the AFSL holder has a 'reasonable belief' that the customer has already received a PDS.

There are no similar provisions under the Credit Bill or Credit Regulations.

#### **Recommendation**

The law should provide that a credit provider may rely on the credit representative to provide the credit providers credit guide (as with section 912C(8) of the Corporations Act and regulation 7.7.02(7) of the Corporations Regulations).

#### **6. Life Insurance Company Loan Facilities**

Some life insurance companies currently offer a loan facility as an additional feature on the policy. In general, the structure of these loans is such that the credit limit can change according to the surrender value of the policy. The loans generally do not have an end date as it is possible for the interest not to be paid and capitalised on each anniversary. If the

amount exceeds to surrender value of the policy then the policy terminates.

These lending facilities operate like an early withdrawal facility. IFSA notes that these types of facilities should not be credit as a policy holder can not make partial withdrawals and only allows policy holders to draw down on the benefit accrued.

We believe these policies would be caught under the Credit Bill and that this may be an unintended consequence of the legislation.

#### **Recommendation**

The legislation should exclude such facilities offered by life insurers on the basis that there is already sufficient protection available for creditors due to the fact that life insurers are prudentially regulated and also hold an AFSL and given the relatively insignificant and unique nature of the credit provided under these policies.

Alternatively, the law should provide for streamlining of non-ADI, APRA regulated entities to ensure that streamlining is available for life insurers that offer such facilities to policyholders.

### **7. Licensing - Prohibition on conducting business with unlicensed persons**

IFSA notes that ^LIC92 of the Credit Bill effectively proposes to ensure that ACL holders undertake an assessment of their counterparties.

IFSA considers that this obligation is unduly onerous and that it should be up to each organisation to determine whether it must be licensed to undertake credit activities. This obligation will potentially increase consumers' costs for acquiring credit. Furthermore, it appears that this assessment must be conducted even where the counterparty is a related entity.

#### **Recommendation**

That the Credit Bill does not include the obligation to conduct an assessment of their associates and provides that a person conducting credit activities is responsible for ensuring that they are appropriately licensed.

### **8. Licensing - Licence numbers**

IFSA notes that an ACL holder must cite its licence number in, among other things, advertisements.

Failure to cite ACL number is a strict liability offence (criminal penalty of 10 penalty units. (^LIC195(1) of the Credit Bill). It is unclear why an ACL holder is required to cite its licence number when they will have an obligation provide a credit guide, which contains an obligation to provide its ACL number and an AFSL holder is not required to cite AFSL number in advertisements.

The obligation applies to **any** advertisements, which would include TV, radio, billboards etc. In some types of media, it may not be practical to include an ACL number, such as radio advertisements.

IFSA is also concerned that where a financial planner may have to cite the ACL number for each lender named in their advertisements.

#### **Recommendation**

That the obligation to cite ACL numbers is consistent with the obligation to cite AFSL numbers as with the provisions under the Corporations Act.

## 9. Responsible Lending

ASIC's exemption and modification powers are set out at ^LIC400 - ^LIC410 of the Credit Bill. ASIC does not have a modification or exemption power in relation to the obligations regarding responsible lending.

### Recommendation

That the Credit Bill be amended to enable ASIC to modify the responsible lending requirements of the Bill and Credit Regulations in appropriate circumstances.

## 10. Responsible Lending - Reliance mechanism or agency re inquiries and verification of consumer information for unsuitability assessment

A credit provider is not required to make inquiries and verify information about the consumer if a preliminary assessment has been made no more than 30 days before providing credit assistance to the consumer. A preliminary assessment of the unsuitability of a credit contract is made under clauses ^R150 and R260(3) of the Credit Bill.

While ^R260(3) would clearly cover the situation where the credit provider is also the credit assistance provider, it is unclear whether a credit provider can rely on a preliminary assessment that is conducted by another person. If so, an issue arises given that each of the credit provider and the credit assistance provider will be required have separate obligations to make reasonable inquiries about the consumer. Additionally, where a person relies on clause ^R260(3), the Credit Bill does not state whether the person is required to sight the previous assessment.

Under AML, a reporting entity is able to rely on customer information collected by another person if the other person collects information for the reporting entity as:

- (a) an agent of the reporting entity (section 37 *AML/CTF Act*); or
- (b) in the course of arranging for the reporting entity to provide a designated service to the customer (section 88 *AML/CTF Act* and Part 7.2 *AML/CTF Rules*).

The Consumer Credit Package does not include an equivalent provision.

### Recommendation

That the law makes it clear that a credit provider can rely on information that is collected and verified as agent of the credit provider or in the course of providing credit assistance in relation to credit provided by a credit provider (as with the provisions under the *AML/CTF Act*).

## 11. Quote for providing credit assistance

A credit assistance provider must, before suggesting or assisting, give the consumer a quote for the credit assistance.

The quote must set out the maximum:

- fee charged by the ACL holder for providing the credit assistance;
- amount of charges that will be incurred by the ACL holder for matters associate with providing the credit assistance; and
- amount of fees or charges that will be payable by the ACL holder to another person on

the consumer's behalf.

(^R135 of the Credit Bill)

We are concerned that the requirement to provide a quote before credit assistance is provided does not work. In addition, we note that the credit assistance provider does not seem to have the ability to provide an updated quote where the fees or charges charged or payable by a customer increases due to unforeseen circumstances, which may include such things as additional queries made by the consumer or an increase in fees or charges of third parties.

**Recommendation**

That the Credit Bill include a mechanism for credit assistance providers to provide an updated quote to customers and makes it clear that the quote does not include commission.

We would be pleased to provide additional information, clarification or assistance in relation to any of the matters raised in this submission.

Yours sincerely



David O'Reilly  
Policy Director – Regulation