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21 May 2009

Manager
Consumer Credit Unit
Corporations and Financial Services Division
The Treasury

Via Email: consumercredit@treasury.gov.au

Dear Sir,

**SUBMISSION
NATIONAL CONSUMER CREDIT PROTECTION BILL 2009
EXPOSURE DRAFT**

Principled Mortgage Investments Ltd welcomes the opportunity to provide comment on the exposure draft of the National Consumer Credit Protection Bill 2009.

The broad move to a consistent national regulatory regime, incorporation of the pre-existing regulatory structure of the Uniform Consumer Credit Code (“UCCC”) and the introduction of Responsible Lending initiatives will provide greater confidence in consumers. These initiatives will also come at a cost to the consumer through additional compliance requirements, although we believe it is a cost the consumer can and should bear to ensure the service providers (“brokers”) and product providers (“lenders”) are more compliant and competent.

Background

Principled Mortgage Investments Ltd is the responsible entity for two managed investment schemes providing mortgage investments. Our investors are exclusively retail clients, with a predominance of retirement savings via self managed superannuation funds.

The mortgage investments we fund are currently provided to borrowers that are not regulated by the UCCC. Many of these borrowers are introduced to our company by brokers. We hold a broad range of security properties.

Policy Issues

We make the following comments on the general policy aims of the proposed legislation:

1. The move to regulate brokers and “credit service” providers generally in a manner that is completely homogenous with the regulation of the lenders is very welcome. However, our experience has identified the following two problems with brokers which have not been addressed by this legislation:

- 1.1 Multiple brokers on a single transaction – on many occasions, we have had a broker (“the final broker”) refer a loan to us for consideration. After undertaking our due diligence, we have become aware the borrower has no contact with the final broker, as they are dealing with another broker (“the client broker”). We have also seen occasions where there are a number of brokers in between the final broker and the client broker.

This situation comes about because the client broker has found the client and established that relationship, but does not have a relationship with a suitable lender. The client broker therefore “refers” the proposal to the final broker to make contact with the lender. Unfortunately, it appears that if the second broker cannot find the lender, they will refer the deal on to another broker and possibly another until a final broker is able to find a lender.

In these cases, we have had multiple brokers then charge the borrower a brokerage fee when, in our view, only the client broker and the final broker could *possibly* justify a fee.

We have treated these loan proposals very carefully, as we think this circumstance is indicative of a loan that may not be suitable for the consumer or our mortgage fund.

In the interest of consumer protection, this practice should be banned. It clearly does not benefit the consumer to have a broker receive a fee and then get another broker to do the work when the consumer is going to have to pay both. If this practice is to be continued, we recommend that the client broker should engage and be required to pay the final broker. The consumer should not bear the cost of their “broker” hiring another person to do their work.

- 1.2 The legislation has not adequately addressed the fundamental issue of clarifying whether a broker is acting on behalf of the consumer or on behalf of the lender. The current proposed Bill will create circumstances where lenders are unfairly penalised for the behaviour of brokers acting on behalf of consumers.

For example, the National Credit Code (“NCC”) at section 11(4)(b) defines a relevant person as a broker if they obtain the declaration, even though the lender may not be paying the broker a commission and the broker may clearly be engaged by and be acting for the consumer.

It is of great concern to us that a broker, acting in the interests of the consumer that has engaged them, could obtain a declaration under section 11 of the NCC that is considered ineffective. If the lender were to act in good faith on the basis of that declaration and provide credit in a manner that does not comply with the code because the lender thought it did not apply, the penalties applicable under the Bill for not complying with the NCC would fall on the lender.

We think this legislation is the appropriate vehicle to clarify the status of the engagement arrangements for brokers. Once this engagement arrangement is clarified, the ethical, compliance, disclosure and liability obligations on broker and lender may be defined in a more certain and equitable manner.

We submit that any penalties must at all times be imposed only on those that committed the breach and not be imposed on those that acted in good faith.

2. Like many other lenders, we do not pay brokers a commission. The brokers that refer a loan to our funds are paid a brokerage fee by the consumer. Once the loan has been provided, the broker is no longer exposed to any risk on the ongoing transaction. There is actually an incentive for the broker to arrange a refinance of the loan because it allows the broker to charge the client another fee. We note that Part 3-1 of the proposed legislation attempts to address this point.

Notwithstanding the requirements of Part 3-1, we believe a broker should be required to disclose all relevant information to the lender that is known to the broker and that if the broker does not, the proposed Bill should prescribe the procedures and penalties to apply. This would strengthen existing common law.

3. The legislation makes it clear at R190(1) and R192(1) that a licensee cannot assist the consumer to enter into an unsuitable contract or remain in an unsuitable contract. If the licensee is of the view there is no suitable contract available in the marketplace, we believe the legislation should require the licensee to advise the consumer of that in writing and advise the consumer where they can obtain information on what their other options are.

For example, a borrower may want to enter into a contract and the lender may consider that the security provided will cover the lender's risk appropriately, but the lender may also be of the view that the borrower is not going to have the financial capacity to reduce or repay the loan, making the loan unsuitable. The broker and lender should be required to provide details of a financial counselling services.

This requirement may:

- (a) alert consumers to any benefits of selling a security property early to preserve as much equity as possible;
- (b) assist consumers to alter their financial behaviours if required; and
- (c) help avoid opportunistic brokers and lenders that can strip equity via unnecessary and inappropriate fees.

Specific Issues with Proposed Legislation

We make the following comments regarding the exposure draft of the proposed Bill:

4. Given the penalties imposed on a licensee under section LIC92, there should be either:
 - 4.1 A positive obligation on a licensee to provide a copy of the licence free of charge when requested; or
 - 4.2 A register publicly available on the ASIC website that is searchable without charge to obtain a copy of the licensee's licence.

We submit both of these options should be included in the proposed Bill.

5. Section LIC370(b)(i) and (c) and (d) all refer to recording the *time* of a payment. The Commentary released with the exposure draft refers to recording the *date* for the same provision. The Bill should be amended to clearly refer to the recording of the date rather than the recording of the time.

We do not believe the requirement to record the time of a payment is realistic or provides material benefits to either the consumers or society broadly, but will increase the costs of administration.

6. Section LIC370(b) and (d) require the licensee to record when payments are received from the debtor and the guarantor respectively. Lenders may at times receive payment from a related party entity that is neither the debtor nor a guarantor. Lenders may also receive a payment via bank cheque with appropriate reference to the account it is to be applied to, but no clear indication whether the debtor or the guarantor has made the payment.

The need to record whether a payment is made by a guarantor rather than a debtor clearly affects the rights of the guarantor, and we submit the guarantor should therefore be required to notify the lender to preserve those rights.

We recommend the regulations specify that, for the purposes of this section, a payment received is deemed to be received from the debtor unless specifically advised in writing that the guarantor has made the payment.

7. The definition in section DEF7 of *credit assistance* is broad and we believe is likely to incorporate the circumstance where a lender is providing assistance to a consumer regarding their own lending product. The lender would then be required to meet the provided of Part 3-1 and Part 3-2 of the proposed Bill, which would add to the cost of the lender (and likely be passed on to the consumer) without adding any material benefit to the consumer.

We do not believe this is intended and recommend that if a lender is providing assistance only in relation to its own credit product, this be excluded from the definition of *credit assistance*.

8. A person who provides a credit service should be required to provide the lender with a copy of the disclosures required under Part 3-1 for the following reasons:
 - 8.1 The risk that unlicensed or non complying broker are able to provide consumers with a credit service will be substantially reduced if the lender is prevented from providing credit unless a copy of these disclosures are provided to the lender;
 - 8.2 Notwithstanding that a lender may rely on the assessment of the broker, we think the risk management requirements of lenders will mean the assessment is completed again by the lender. This should provide the consumer with greater confidence that the product is suitable for them, as the suitability assessment is undertaken by two different organisations.
9. The lender may be required to make certain assumptions in order to make the suitability assessment required by Division 3 of Part 3-2. If a lender does make certain assumptions and submits those assumptions to the consumer as part of the suitability assessment before the contract is entered into, the consumer should be obligated to notify the lender if the assumptions are incorrect.

We recommend that pursuant to section R290(4), the regulations deem untestable assumptions made by a lender when making a suitability assessment and submitted to the consumer to be reasonable enquiries for the purposes of Section R260.

Our managing director, Geoff Rowles, is available to discuss these submissions further if required.

Yours faithfully
PRINCIPLED MORTGAGE INVESTMENTS LTD