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9 March 2012

Manager
Financial Services Unit
Retail Investor Division
The Treasury
Langton Crescent
PARKES ACT 2600

By Email: instalmentwarrantcorpregs@treasury.gov.au

Dear Sir,

Re: Exposure Draft - Corporations Amendment Regulations 2012 (No.) - Limited Recourse Borrowings by Superannuation Funds (Instalment Warrants).

Thank you for the opportunity to comment on the proposed amendments to the “Exposure Draft Corporations Amendment Regulations” published on 13 February 2012. These regulations are designed to “bring limited recourse borrowing arrangements (including instalment warrants) by superannuation funds into the Government’s financial consumer protection framework”.

It is the submission of Mortgage Choice that to the extent that limited recourse borrowing arrangements are permitted to allow Self Managed Superannuation Funds (SMSFs) to acquire real property, those arrangements already fall within extensive consumer protection regimes established either through the *National Consumer Credit Protection Act* (NCCP) or existing external dispute resolution scheme memberships. We submit that limited recourse borrowing arrangements to acquire real property should be excluded from the proposed Regulation, as there are already sufficient regulations in place to meet the stated policy objective with respect to those limited recourse borrowing arrangements.

Introduction

Mortgage Choice is Australia’s largest independently operated Mortgage Broker. We arrange loans to self managed superannuation funds to enable them to acquire property. Rather than being “unlicensed

and unqualified”¹, we hold an Australian Credit Licence issued by ASIC (number 382869) and are a member of the Mortgage and Finance Association of Australia. At present Mortgage Choice does not hold an Australian Financial Services Licence (AFSL), but the proposed regulation will require us to either acquire an AFSL, or abandon the substantial business opportunity that we have developed arranging loans for SMSFs.

Below we describe Mortgage Choice’s role in arranging loans to SMSFs to acquire real property:

1. An SMSF trustee receives advice from an AFSL holder (typically a financial planner) about investment strategy;
2. The SMSF trustee approaches Mortgage Choice about securing finance for a proposed property purchase;
3. Mortgage Choice identifies a potential lender for the SMSF trustee;
4. The SMSF is the borrower of the loan;
5. a security custodian is appointed by the SMSF to purchase the property of behalf of the SMSF Trustee;
6. the security custodian mortgages the property to the lender as security for the loan;
7. Mortgage Choice might receive a commission from the lender as disclosed in the Credit Quote and Proposal;
8. In the event of a default by the Trustee, the Lender has limited recourse to the SMSFs assets, and only has access to the Security Property.

Mortgage Choice does not provide financial advice or tax advice in arranging loans for SMSFs, and requires that all brokers must be accredited by Mortgage Choice before arranging loans for SMSFs. This accreditation can only be obtained by undertaking extensive training to ensure that they are aware of the limits of the activities they can undertake under an Australian Credit Licence.

Consumer Protections already available to SMSFs when dealing with Mortgage Choice

In addition to following the Code of Practice covering all members of the Mortgage and Finance Association of Australia, we have also developed our own consumer protection initiatives such as a Customer Charter, Credit Guide and an alternative remuneration register which is fully available to the public.

All Mortgage Choice consultants receive the same commission percentage for each loan product, which we believe reduces the potential for conflicts of interest between the consultant and the customer. The Customer Charter sets out our internal dispute resolution procedure (through the Compliance and Customer Service Manager). We also fully disclose to the customer any commission which is received by Mortgage Choice.

In addition, loans to a SMSF where the trustees are individuals and the loan purpose is to purchase residential property are covered by the relevant provisions of the consumer protection regimes of the NCCP.

Importantly, all customers of Mortgage Choice have access to the Credit Ombudsman Service (COSL) in relations to complaints about the service provided by Mortgage Choice. COSL is approved by

¹ Exposure Draft Explanatory Memorandum Corporations Amendment Regulations 2012 (No.) - Limited Recourse Borrowings by Superannuation Funds (Instalment Warrants)

ASIC as an external dispute resolution service. In particular, we note that Consumer is defined in the rules of COSL as:

““Consumer”

means an individual (whether acting as a trustee or otherwise), a partnership comprising individuals or a Small Business, but does not include:

(a) an individual that COSL determines is not a consumer for the purposes of the COSL Rules or Guidelines because of the assets, wealth, or both, that the person has, holds or controls; (...)”²

The rest of the exceptions to the definition of “Consumer” relate to members of COSL who are might also be consumers. Thus, SMSFs are able to make complaints to the Credit Ombudsman Service, whether they are individuals or corporate entities, even though corporate entities may not be covered by the NCCP provisions.

COSL will only exercise the discretion to decline to regard a person/trustee/small business as a consumer where the person/company/trustee has assets over \$2.5 million, gross income in the preceding years of over \$250,000, or is a professional investor³ It is significant that the Guidelines to the Rules of the Credit Ombudsman Service specifically contemplate complaints to the Service by Trustees⁴

Once a complaint has been made to COSL, the resolution of that complaint is binding on Mortgage Choice as a member of the Scheme⁵, but in relation to the consumer:

“A COSL decision is only binding on a Complainant if the Complainant accepts it. If the Complainant does not accept a COSL decision, the Complainant is at liberty to pursue other remedies in relation to the subject matter of the Complaint in the Courts or any another forum.”⁶

To date Mortgage Choice has been the subject of no complaints to COSL by the Trustee of a SMSF.

Impact of the Proposed Regulation on Mortgage Choice

This regulation will adversely affect a business of Mortgage Choice; the arranging and facilitation of loans to SMSFs which enable them to acquire real property. These loans have no unusual risks that arise from the interposition of another financial product, and should be readily understood by a consumer with sufficient acumen to be the trustee of a SMSF. We submit that these loans should be characterised as needing the equivalent level of consumer protection as loans to small businesses to enable them to acquire property.

We submit that the regulation of limited recourse borrowing arrangements should be developed on the basis of the nature of the investment, with a special category for investments where the underlying asset is real property. The risks associated with investing in real property are well understood within the SMSF sector, and to impose the requirement on Mortgage Choice to hold an AFSL to deal with the SMSF sector is an unreasonable burden.

² Credit Ombudsman Service Rules (8th Ed) Paragraph 45.1.

³ Guidelines to the Rules of the Credit Ombudsman Service (4th Ed) Paragraph 20.2, 22.1, and 24.2

⁴ See Paragraph 24.

⁵ Credit Ombudsman Service Rules (8th Ed) Paragraph 39.1

⁶ Credit Ombudsman Service Rules (8th Ed) Paragraph 39.3

In addition to the need to obtain an AFSL, Mortgage Choice is deemed through the proposed regulation to be an “issuer” rather than an arranger of the financial product. This aspect of the proposed regulation is unclear, and we submit that it would be preferable to have a regulation which does not deem parties to be issuers when their role is more properly characterised as being an arranger. The compliance regime within Mortgage Choice, which has been developed to meet its obligations in relation to the NCCP, and will need to be adapted into an AFS compliance regime solely for dealings with SMSFs.

We further note that the proposed sub-regulation 70.1.06 (2A) is likely to cause confusion where it deems what is understood to be a loan to acquire real property to be “not a credit facility”. The explanatory Memorandum states that the proposed sub-regulation 7.1.06 (2A) will “prevent persons that merely provide credit as part of a limited recourse borrowing arrangement from being caught by the new requirements”. On our interpretation, the wording of sub-regulation 7.1.06 (2A) does not achieve that goal.

If Mortgage Choice is required to cease arranging loans for SMSFs there will be a substantial diminution in competition in the market supplying loans to SMSFs.

Mortgage Choice would like to take the opportunity to offer its assistance to Treasury in further discussing these matters.

Yours faithfully,

MORTGAGE CHOICE LIMITED

A handwritten signature in black ink, appearing to read 'Michael Russell', written in a cursive style.

**MICHAEL RUSSELL
CHIEF EXECUTIVE OFFICER**