PUBLIC CONSULTATION UNDERWAY FOR CONSUMER CREDIT REFORMS

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By: Daniel Knight, Talia Le Couteur Scott

On 25 September 2020, the Australian Government announced multiple reforms to consumer responsible lending laws, with the intention to stimulate the economy by reducing the cost and time for consumers and businesses to access credit. On 12 October 2020, we reported on the policy and context behind this development.

Subsequently, from 4 November 2020, the Department of the Treasury has sought public consultation on a suite of proposed consumer credit legislative reforms including:

- the *National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020 (Cth)* (including the Explanatory Materials) (Amending Bill);
- the *National Consumer Credit Protection Amendment (A New Regulatory Framework for the Provision of Consumer Credit) Regulations 2020 (Cth)* (including the Explanatory Materials) (Amending Regulations); and
- the *National Consumer Credit Protection (Non-ADI Credit Standards) Determination 2020 (Cth)* (including the Explanatory Materials) (Non-ADI Credit Standards).

Public consultation will close on 20 November 2020. The measures will commence on 1 March 2021, subject to the passing of legislation.

AMENDING BILL

The main changes the Amending Bill will make to the *National Consumer Credit Protection Act 2009 (Cth)* (NCCP Act) are as follows:

Responsible lending obligations (RLOs) will be amended. For example:

- As the law currently stands, RLOs apply to all consumer credit contracts, consumer leases and small amount credit contracts (SACCs), for both credit providers and credit assistance providers. Under the Amending Bill, RLOs will only apply to SACCs, SACC-equivalent loans provided by authorised deposit-taking institutions (ADIs) and consumer leases, for both credit providers and credit assistance providers.
- ADIs will no longer be subject to RLOs (other than for SACC-equivalent loans). However, existing prudential standards set and enforced by the Australian Prudential Regulation Authority (APRA) under the Banking Act 1959 (Cth) will continue to apply.

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- Non-ADI credit conduct will no longer be subject to RLOs, excluding SACCs and consumer leases. Rather, non-ADI credit conduct will be subject to non-ADI credit standards made by legislative instrument, similar to those imposed on ADIs.

To ensure consumers' interests are still adequately protected, a "best interests" duty and obligation to resolve conflicts of interest in the consumers' favour will be introduced, applying to all credit assistance providers. Accordingly, licensees and their credit representatives will be required to act in the best interests of consumers when providing credit assistance in relation to credit contracts; and where there is a conflict of interests, give priority to consumers in providing credit assistance in relation to credit contracts. As the law currently stands, the "best interests" duty and obligation only applies to mortgage brokers but will now be extended to all brokers.

A new non-ADI credit standard will be introduced. Under the NCCP Act, the Minister will be able to make non-ADI credit standards, by way of legislative instrument, specifying requirements for a credit licensee's systems, policies and processes relating to certain non-ADI credit conduct.

NON-ADI CREDIT STANDARDS

Section 133EA will be inserted into the NCCP Act by the Amending Bill, providing that the relevant Minister may, by legislative instrument, determine non-ADI credit standards specifying requirements for a credit licensee's systems, policies and processes relating to non-ADI credit conduct. This section is in line with APRA's prudential lending requirements.

The purpose of the non-ADI Credit Standards is to ensure non-ADI credit providers establish, maintain and implement systems, policies and processes directed toward credit being provided where the licensee has assessed that a borrower will have the capacity to repay any credit provided without substantial hardship. Therefore, licensees will be required to implement adequate systems, policies and processes relating to non- ADI credit conduct, rather than impose individual conduct level obligations. Accordingly, credit assessment will be able to move away from a prescriptive framework for lenders and borrowers, and will support risk-based lending attuned to the needs and circumstances of the borrower and credit product. These systems, policies and processes will ultimately provide for the licensee to assess a borrowers' capacity to repay credit without substantial hardship. A licensee will contravene the NCCP Act if the licensee repeatedly fails to give effect to the systems, policies and processes.

Although at first glance the Non-ADI Credit Standards appear to be inspired by similar policy motivations to RLOs, the Australian Government has flagged its intention in the Explanatory Materials that the standards would be more principles based and less prescriptive:

"The Standard requires licensees to implement adequate systems, policies and processes relating to non-ADI credit conduct, rather than impose individual conduct-level obligations. This reflects the need to move away from a prescriptive framework for lenders and borrowers, towards one that encourages risk-based lending that is attuned to the needs and circumstances of the borrower and credit product."

Rather, the requirements are directed toward credit being provided where the licensee has assessed that a borrower will have the capacity to repay any credit provided without substantial hardship. It is intended that the licensee has substantial flexibility about how it makes that assessment.

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PUBLIC CONSULTATION

Interested parties may submit responses to these proposed reforms up until 20 November 2020.

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KEY CONTACTS



DANIEL KNIGHT
PARTNER

MELBOURNE
+61.3.9640.4324
DANIEL.KNIGHT@KLGATES.COM

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