

27 January 2021

Our ref: WD&KS: BF&CCL

Mr Michael Tidball
Chief Executive Officer
Law Council of Australia
GPO Box 1989
Canberra ACT 2601

By email: [REDACTED]

Dear Mr Tidball

National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020

Thank you for the opportunity to provide feedback on the National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020 (**the Bill**). The Queensland Law Society (**QLS**) is pleased to provide comments on this significant legislative reform.

This response has been compiled with the assistance of members from the QLS Banking and Financial Services Law and Competition and Consumer Law Committees, whose members have substantial expertise in this area.

Currently, all credit licensees must adhere to the responsible lending conduct obligations required by Chapter 3 of the *National Consumer Credit Protection Act 2009* (**National Credit Act**) which apply to both credit providers and credit assistance providers¹.

Schedule 1 to the Bill seeks to amend Chapter 3 of the National Credit Act so that from 1 March 2021 (or the day after Royal Assent), responsible lending obligations will apply only to small amount credit contracts and consumer leases and small amount credit contract-equivalent loans provided by Authorised Deposit-taking Institutions (**ADIs**)².

QLS echoes the concerns raised by the Law Council with respect to the potential impact on consumer rights and outcomes arising from the Bill. We note in particular the concerns raised by the Law Council in the submissions on the exposure drafts of the Bill dated 19 November and 24 November 2020.

¹ <https://www.cpaaustralia.com.au/professional-resources/financial-planning/regulation-of-consumer-credit/responsible-lending-conduct-obligations>.

² Explanatory memoranda, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6656, page 9.

National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020

Our members support the retention of responsible lending obligations and consider that strong consumer protections are vital to a well-functioning lending market. We are not aware of any evidence that responsible lending has reduced access to credit.

QLS is concerned that removing these obligations will place vulnerable consumers in worse financial circumstances and may have significant access to justice implications.

As noted in the Law Council's submission of 19 November 2020, the responsible lending obligations were introduced in the context of the global financial crisis and following recommendations of the Productivity Commission's report on the *Review of Australia's Consumer Policy Framework* (May 2008).

The submission of 19 November 2020 also outlined key parts of the Explanatory Memorandum (EM) for the National Consumer Credit Protection Bill 2009, which provided lengthy contextual information and detailed commentary on important provisions.

In addition to that context, QLS suggests that in responding to the current Bill, it may also be helpful to include examples outlined in the EM of the undesirable conduct of brokers and lenders which prompted the responsible lending provisions, including:

- brokers recommending products that earned them higher commissions but which are inappropriate, higher cost or unaffordable for their clients;
- brokers misrepresenting the applicants' financial details so that the loan is approved, and the broker receives commissions, when, if the lender was aware of the borrower's actual financial position, they would reject the application;
- brokers 'upselling' loans to higher amounts to increase commissions; and
- brokers and lenders engaging in 'equity stripping', that is, arranging or providing high-cost loans for borrowers in financial difficulty (particularly those facing foreclosure of the family home), in the expectation that the borrower will default with subsequent transfer of the consumer's equity in their home to the broker and the lender through fees, charges and default interest.³

The EM also referenced the conclusion of the Productivity Commission 2008 report that 'those tasked with the detailed development of the new national regime for consumer credit should consider how 'responsible lending' issues might impact on the regulatory arrangements'.

'[The] distribution channels for credit to consumers (such as the use of various intermediaries) and the development of products such as no and low documentation loans have often placed the borrower at arm's length from the lender and have limited the documentation and inquiries regarding a consumer's financial position that lenders have before them, when deciding whether or not to approve an application. The consumer is in a position where they are dependent on the intermediary's skill and expertise. The level of regulation of market participants providing such services varies significantly from State to State.'⁴

³ Explanatory Memorandum for the National Consumer Credit Protection Bill 2009 at paragraph 3.11

⁴ Explanatory Memorandum for the National Consumer Credit Protection Bill 2009 at paragraphs 3.8 and 3.9

National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020

QLS is also aware that the Consumer Action Law Centre (CALC) provided a submission in response to the Exposure Draft of the current Bill. In their submission, the outlined the following experiences of their contributors in the period prior to the introduction of the responsible lending provisions:

“Other issues identified by consumer advocates in this period included:

- Increasing use of low doc and no docs loans to lend money to people who had no capacity to pay;
- Inappropriate promotion of line of credit loans which were more expensive and poorly suited to many borrowers, including in some cases to elderly people in lieu of reverse mortgages;
- Poor quality valuations;
- Loans for interstate investment properties with inflated prices resulting in significant borrower/investor losses;
- Scams involving fake “savings” provided by high cost fringe lenders, to sell overpriced properties to newly arrived migrants and refugees with no capacity to pay;
- Equity/asset stripping lending (high interest, high fees and brokerage and no capacity to pay);
- Repeated limit increases on credit cards, unsolicited or otherwise, based on repayment history of minimum amounts, rather than affordability, resulting in unmanageable limits;
- Interest-free deals in-store which resulted in backdated high interest debt if the borrower could not pay off 100% of the debt within the interest free period; and
- Car yard loans and leases for poor quality vehicles at high interest, with inadequate supporting documentation, and sometimes fraudulent documentation provided on site.

While many of these practices were in the non-bank sector, they were far from exclusively so. The Storm Financial debacle provided an excellent case study on how perverse incentives worked within banks to drive behaviour that was clearly outside standard policies and procedures; many other examples of which were later laid bare by the Financial Services Royal Commission.”⁵

The CALC submission also includes a number of other case examples throughout the submission and in Appendix A to the submission regarding the importance of RLOs.

QLS considers that the additional examples outlined above may provide further support for the position that the responsible lending provisions should be maintained.

The responsible lending obligations were an appropriate regulatory response to a demonstrated problem in credit markets. If that regulation is now removed, it can be expected that the problems evident before the regulation will return.

⁵ CALC submission to “Treasury consultation: Consumer Credit Reforms: dated 20 November 2020 available at <https://consumeraction.org.au/treasury-consultation-consumer-credit-reforms-our-submission/>

National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020

Complaints to AFCA in 2019-2020

The AFCA (**Australian Financial Complaints Authority**) Annual Review arises from the reporting requirements for external dispute resolution (**EDR**) schemes set out in Australian Securities and Investments Commission (**ASIC**) Regulatory Guide 139 and Regulatory Guide 267. The 2019–20 Datacube⁶, shows complaint data about AFCA members and is also required under ASIC Regulatory Guide 267.

In the 2019 to 2020 financial year, credit, in its various forms, comprised approximately 30-40% of the 76,880 complaints which AFCA received. Of these, only 1.2% of all complaints were about small amount credit contracts or consumer leases or, approximately, 3% of those about credit. That is, the products to which the responsible lending obligations under the Bill will continue to apply.

In effect, this means that the Bill will remove the responsible lending obligations from credit products which account for 97% of all credit complaints to AFCA. AFCA will not be able to refer to them when resolving consumer complaints.

Whilst ADIs will still be subject to a prudential regulatory framework, including standards which are enforced by APRA, we understand that the responsible lending obligations provide a more robust compliance framework of consumer protection.

We note for example that the ASIC Regulatory Guide 209 'Credit licensing: Responsible lending conduct'⁷ provides for a presumption of substantial hardship where:

'It is presumed that if a consumer will only be able to comply with their financial obligations under the credit product by selling their principal place of residence, then the consumer could only comply with those obligations with substantial hardship, unless the contrary is proved'.⁸

We understand that there is no analogous presumption in the APRA Prudential Practice Guide APG 223 Responsible Mortgage Lending⁹.

Our members are concerned that the APRA standards proposed in the Bill are less prescriptive and, therefore, less determinative than the responsible lending obligations in the National Credit Act. This is likely to make the resolution of consumer disputes more difficult for AFCA and may lead to far fewer positive outcomes for consumers.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully



Elizabeth Shearer
President

⁶ Available at <https://data.afca.org.au/>.

⁷ <https://download.asic.gov.au/media/5403117/rq209-published-9-december-2019.pdf>.

⁸ <https://download.asic.gov.au/media/5403117/rq209-published-9-december-2019.pdf>, page 76.

⁹ <https://www.apra.gov.au/sites/default/files/APG%20223%20APG%20223%20Residential%20Mortgage%20Lending%20July%202019.pdf>.