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AUSTRALIAN FINANCIAL SERVICES LICENCE NO. 232 479

11 February 2013

Manager
Disclosure and International Unit
Retail Investor Division
The Treasury
Langton Crescent
PARKES ACT 2600

via email: creditphase2bill@treasury.gov.au

Dear Sir/Madam

NATIONAL CONSUMER CREDIT PROTECTION AMENDMENT (CREDIT REFORM PHASE 2) BILL 2012 – SUBMISSION FROM ANGAS SECURITIES LIMITED

Angas Securities Limited (AFS licence number 232479) is a commercial property financier. We propose to comment on only some provisions of the exposure draft.

Item 2, subsection 5(1A) - we comment on the proposal that "contracts where the maximum amount of credit exceeds the sum of $5 million be excluded…."

In our view the threshold amount of $5 million is too high. We note the RBA typically categorises loans as being "small business" if the loan principal is under $2 million. See RBA Small Business Finance Roundtable May 2012 papers, in particular "Small Business: An Economic Overview" Connolly, Norman and West where the authors note at page 1 of their paper:

> *"Although the concept of a 'small business' is quite intuitive, there is no consistently used definition. Common definitions categorise businesses based on:*
> - *their number of employees, as used by Fair Work Australia (FWA) and in most surveys of small businesses; or*
> - *annual revenue, as used by the Australian Taxation Office (ATO) (Table 1).*
>
> *Reflecting the available data, the RBA typically categorises loans as being 'small business' loans if the loan principal is under $2 million, or if the borrowing business is unincorporated. Financial institutions use a wider range of criteria, including the loan size, number of employees, revenue, and balance sheet indicators."*

We see absolutely no good policy reason to deviate from the suggested RBA threshold figure of loans under $2 million. No sound reason is given for the $5 million figure and it beggars belief that persons making commercial decisions to borrow $5 million should be subject to the Code – particularly when the law provides ample remedies for borrowers who claim to be the subject of unlawful conduct (whether by way of misrepresentation,

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unconscionability or otherwise). The likely effect of this proposal will be to restrict access to finance by small business, erode competition by further entrenching the position of the major players and generally increase the cost of funds as lenders seek to pass on increased compliance and system costs to borrowers.

Further, and additionally, we would suggest that at the very least, loans to people who otherwise qualify as "sophisticated investors" for the purposes of the Corporations Act should not be caught by this proposal.

Item 18, section 133 FB/item 18, Part 2, Division 2, Subdivision B – protected small business credit contracts.

We wish to comment on the underlying theme of these proposed provisions. In our view, once again, the likely impact will be to restrict and increase the cost of credit to small businesses. At the end of the day, for many small businesses, the residential property is the prime asset used to secure a loan (absent security, the loan will either be declined or the borrower will pay much higher unsecured rates).

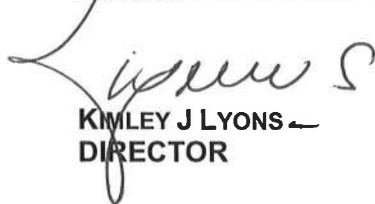
The proposal is also unworkable in practice. A touchstone of applicability is that the small business has "failed to comply with [its] financial obligations under the defaulting contract". What does this mean? In a simple contract where the borrower must pay a monthly principal and/or interest amount, failure to so pay can readily be recognized as default. Consider a pre-paid fixed term interest facility about to expire. The borrower seeks to vary the facility by negotiating an extension of the expiry date because, for example, a Development Approval is about to be obtained (which will enhance the property value). The borrower clearly has not repaid the principal and interest, all of which will fall due at the termination of the facility – indeed the borrower may be negotiating to borrow more against the enhanced value. Will the "variation" to the expiry date be treated as a default? If not, why not? If so, why should this be? Will the treatment depend on whether the variation was made before the original contract date expired or not? A contract can always be varied – even retrospectively - if the parties agree. If the treatment will vary depending on the date of the "variation" is it the case that a contract varied before the original expiry date will be outside the scope of this Part (assuming residential property offered up a security). And what about multi-security facilities, including residential/non-residential assets where the non-residential assets provide most of the security value. Will this facility be caught? If so, why? Particularly if the likely impact of removing the residential security from the facility will be to raise the loan LVR leading to either higher rate (for higher risk) or loan declination.

Item 18, section 133FC – section 133FC (6) provides that a credit provider "must not request or demand payment of an amount for ...credit assistance before the [credit provider] provides the assistance". The ambit of this prohibition is unclear. In a typical property financing proposal, the borrower will be required to pay the cost of obtaining an arm's length property valuation before a credit provider will even consider the finance proposal. This is a cost properly payable by the party seeking to borrow funds. The valuation will be commissioned by the credit provider because it is to the credit provider that the valuer owes a duty of care. And if the valuation comes in too low, then the financing proposal will not proceed. No "credit assistance" will be provided. And yet it is suggested that the credit provider cannot demand payment of the valuation fee before

providing the credit assistance – but in the example given, no credit assistance will be forthcoming. Similarly, if a borrower submits a complex transaction, it is perfectly reasonable for a lender to charge a fee to spend time analyzing the possible transaction even if it does not proceed - note: we do not cavil with the proposition that the amount of the fee must be clearly disclosed in advance.

Item 18, Part 2, Division 2, Subdivision B (protected small business contract inquiries) – section 133FE (1) (c) suggests the credit provider must make reasonable inquiries "about whether the [borrower] thinks that entering into, or increasing the credit limit of, the contract will enable the [borrower] ... to obtain a higher price from the sale of that [residential] property". This provision reveals the fundamental misunderstanding of real world property finance transactions in which most property financiers engage. In many instances, a residential property is offered up as part of a suite of securities to enable a commercial development in relation to another property to proceed. The residential property is not, itself, the property being developed. So the mandated inquiry is utterly pointless.

Yours faithfully
ANGAS SECURITIES LIMITED



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