

15 February 2013

Our reference
ABAN.ABEA

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Manager
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The Treasury
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Dear Sir/Madam

National Consumer Credit Protection Amendment (Credit Reform Phase 2) Bill 2012

1. Introduction

- 1.1 We are pleased to provide our comments on the exposure draft of National Consumer Credit Protection Amendment (Credit Reform Phase 2) Bill 2012 (**Phase 2 Bill**) as released on 21 December 2012. We note that the Phase 2 Bill proposes significant amendments to the *National Consumer Credit Protection Act 2009 (Cth)* (**NCCP Act**), including the *National Credit Code* (**NCC**).
- 1.2 Our submissions do not respond to all the questions raised by Treasury but focuses specifically on the following proposed provisions:
- (a) section 133FB(2) of the NCCP Act – Meaning of protected small business credit contract;
 - (b) section 133EB(4) of the NCCP Act – Meaning of protected investment credit contract; and
 - (c) section 5(1)(b) of the NCC – Provision of credit to which this Code applies.

We are aware of other matters covered in the submission by the Law Council of Australia however for brevity and efficiency; we do not repeat them here.

2. Protected small business credit contract

- 2.1 The Phase 2 Bill proposes to introduce limited responsible lending obligations on credit providers and credit assistance providers in relation to '*protected small business credit contract*'. Section 133FB(3) defines protected small business credit contract as a small business credit contract where:

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- (a) the consumer's obligations under the contract are or will be secured by a mortgage over residential property of the consumer or another person; and
- (b) the credit is provided predominantly for the purpose of enabling the consumer to comply with the consumer's financial obligations under another contract (the **defaulting contract**) between the consumer and the credit provider or another person; and
- (c) before the contract is entered into, the consumer has failed to comply with the consumer's financial obligations under the defaulting contract.

Mortgage over residential property

- 2.2 We note that the proposed definition of protected small business credit contract refers to a '*mortgage over a residential property of the consumer or another person*'. This definition should be differentiated from the proposed definition of 'protected investment credit contract' in section 133EB(4)(b) which only refers to a '*mortgage over the consumer's principal place of residence*'.

As proposed, a small business credit contract secured by a mortgage over a consumer's residential investment property or a residential investment property owned by someone else is capable of being classed as protected small business credit contract. However, a mortgage over such properties will not be sufficient to meet the criteria in section 133EB(4)(b).

We query if Treasury intends to provide different levels of protection for credit provided for small business or credit provided for investment purposes by varying the types of properties that can be mortgaged.

Defaulting contract

- 2.3 The proposed definition in section 133FB(2)(b) refers to a consumer obtaining credit to comply with the financial obligations under another contract – ie defaulting contract. In our opinion, either of the following situations can satisfy the defined scenario:
- (a) a consumer obtaining credit just to meet the ongoing obligations (eg monthly payments) under the defaulting contract; or
 - (b) a consumer refinancing the defaulting contract in full.

Further, section 133FB(3)(c) refers to consumer failing to comply with the financial obligations under the defaulting contract. The proposed definition will include a scenario where a consumer has remedied a missed repayment in the past – even if the missed payment took place 2 years before entering in a new contract.

We would appreciate if Treasury is able to provide further guidance as to the scope of section 133FB(2)(b) and (c).

3. Protected investment credit contract

- 3.1 The proposed definition of protected investment credit contract includes where the credit is provided for the purposes of acquiring a financial product from a person prohibited from providing that product under the *Corporations Act 2001* (section 133EB(4)(a)(ii)). Under the proposed definition, the credit provider will be required to undertake due diligence about the financial product being acquired by the prospective borrower and the issuer of that financial product. This may lead to practical difficulties for the credit provider in certain circumstances.

We query if Treasury intends to impose additional due diligence obligations on a credit provider when providing credit for investment purposes.

4. Provision of credit to which the NCC applies

- 4.1 Section 5 of the NCC is the main operative provision as it sets out the situations in which the NCC will apply. Schedule 3 of the Phase 2 Bill proposes to amend section 5(1)(b) of the NCC to allow the NCC to apply to contracts where credit is provided for investment purposes.

The current provision of the NCC refers to credit as 'provided **wholly or** predominantly' for various purposes. The proposed amendments delete the references to 'wholly' in section 5. We query whether this is advisable – as to do so raises the risk that the provision is intended to have a different meaning in the future compared to the current NCC. We can understand the thinking behind the drafting of the new provision – however for continuity perhaps its worthwhile retaining 'wholly' as per the original drafting.

- 4.2 We note that the Phase 2 Bill does not provide any guidance notes as to the meaning of 'investment purposes'. As section 5 is a key operative provision, we would appreciate Treasury providing comments as to the interpretation of the phrase 'investment purposes'. For example, clearly Treasury has decided not to attempt to include a comprehensive definition of 'investment purposes'. However, perhaps Treasury could consider including a non-exhaustive guidance note.

We would like to thank you again for providing us the opportunity to provide comments on the draft legislation. We will be pleased to provide further comments if required to do so.

Yours faithfully

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