

3 February 2021

Committee Secretariat
Senate Standing Committee on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

By email: economics.senate@aph.gov.au

Dear Secretariat,

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

COBA appreciates the opportunity to contribute to the Senate Economics Committee's inquiry into the National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020.

COBA is the industry association for Australia's customer owned banking institutions (mutual banks, credit unions and building societies). Collectively, our sector has \$144 billion in assets and more than 4 million customers. Our sector's share of ADI housing lending is 5.6 per cent and our share of ADI personal lending is 5.3 per cent.¹

Customer owned banking institutions account for around three quarters of the total number of domestic Authorised Deposit-taking Institutions (ADIs) and deliver competition, choice and market leading levels of customer satisfaction in the retail banking market.

COBA's members have a strong presence in regional Australia. The head offices of eight of the 10 largest customer owned banking institutions are outside Sydney and Melbourne, including in Brisbane, Adelaide and Perth and in regional centres such as Toowoomba, Newcastle and Wollongong.

Key points:

- **COBA strongly supports simplifying unnecessarily complex regulation to make it easier for consumers and small business to access credit.**
- **The current responsible lending obligations (RLOs) are not well drafted. The requirements are elaborate and prescriptive, with very significant penalties attached, yet they are unclear.**
- **The removal of ASIC oversight of RLOs for ADIs will remove regulatory duplication for ADI lenders and enhance competition.**
- **Borrowers will continue to be protected by multiple consumer protection regimes as well as ongoing, but simplified, RLOs.**

COBA's position on the Bill

The customer owned banking sector has a long history of sound lending practices and putting our customers first. We remain committed to the responsible provision of credit.

¹ APRA Monthly ADI Statistics December 2020: loans to households (housing) & loans to households (other).

COBA strongly supports simplifying unnecessarily complex regulation to make it easier for consumers and small business to access credit, reduce red tape and improve competition while ensuring that the strongest consumer protections are targeted at the most vulnerable consumers.

We support a level playing field for ADI and non-ADI lenders. A level playing field promotes competition, consumer choice and a consistent consumer experience in the consumer credit market.

The framework delivered by the Bill, including applying key elements of APRA's credit risk management prudential standard to non-ADIs, can meet these objectives.

We have been engaging with Treasury and APRA on the proposed reforms since the Government's policy announcement on 25 September 2020.

As outlined in the Explanatory Memorandum to the Bill, the proposed changes to the Credit Act retain the need for reasonable individual credit assessment and the resulting consumer protection. The new regime will not remove the ability of consumers to dispute transactions or obtain redress from their financial institution. "Instead of an individual loan level obligation, lenders will be required to undertake reasonable credit assessments using the appropriate systems, policies and procedures in place to make reasonable inquiries and appropriately evaluate credit applications. They will be required to assess whether the consumer will be able to comply with the financial obligations under the contract without substantial hardship. Lenders will continue to be required to maintain appropriate internal dispute resolution processes. Consumers will also continue to receive free redress from AFCA in the event disputes cannot be resolved directly with the consumer's financial institution."²

APRA is proposing to amend the relevant prudential standard, APS 220 *Credit Risk Management*, to add the following sentence: "For exposures to individuals, an ADI must assess the individual's capacity to repay credit without substantial hardship."

Current responsible lending obligations under the Credit Act

The current responsible lending obligations (RLOs) in the National Consumer Credit Protection Act (Credit Act) are not well drafted and have created a burdensome regime for lenders and borrowers.

We agree with the statement in the Bill's Explanatory Memorandum that the ASIC v Westpac (Wagyu and Shiraz) case and the Financial Services Royal Commission created significant uncertainty among credit providers around how to interpret and comply with RLO legislation and regulation."³

The scale of the regulatory risk posed to lenders (with consequent impacts on borrowers in terms of cost and customer experience) by the RLOs was highlighted by ASIC's September 2018 announcement that it had reached agreement with Westpac on a \$35 million civil penalty for breaching the RLOs. This agreement was rejected by the Federal Court and the subsequent court action by ASIC against Westpac culminated in judgement against ASIC on 26 June 2020.

Observations by the judges⁴ reinforce why there is such a strong case to simplify the consumer credit regulatory regime. These observations include:

- the requirements are specific and detailed and contraventions are subject to very significant penalties
- the regime imposes "prescriptive procedural obligations" on the credit provider

² National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020, Explanatory Memorandum, part 2.33

³ National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020, Explanatory Memorandum, part 2.13

⁴ <https://download.asic.gov.au/media/5644950/asic-v-westpac-banking-corporation-2020-fcafc-111.pdf>

- “[If] Parliament intended to make it pellucid exactly what licensees needed to do before entering into a credit contract, that effort miscarried”
- it is an “elaborate statutory regime”, and
- identifying the proper construction of key provision “is not straightforward” and “civil penalty provisions should be interpreted on the basis that it is to be expected that an obligation imposed would have been identified clearly and unambiguously.”

In ASIC’s September 2018 announcement of the \$35 million civil penalty, ASIC Chair James Shipton described it as a “very positive outcome and sends a strong regulatory message to industry that non-compliance with the responsible lending obligations will not be tolerated.”

During the period that ASIC was taking this approach to enforcing the RLOs, the Financial Services Royal Commission took place. In his final report, Commissioner Hayne noted that consumer groups had urged him to recommend that the Credit Act be amended to require lenders to determine whether a loan contract (or credit limit increase) was ‘suitable’ for the consumer (as distinct from ‘not unsuitable’).

“I do not favour that proposal,” Commissioner Hayne said.

In COBA’s view, the Commissioner’s specific recommendation, i.e. that the Credit Act should not be amended to alter the obligation to assess unsuitability, does not amount to an endorsement of the RLOs. Rather, the Commissioner noted the ongoing Federal Court case and said: “My conclusions about issues relating to the NCCP Act can be summed up as ‘apply the law as it stands’.”

Since then, ASIC lost its case against Westpac on 26 June 2020 and spent several weeks considering whether to appeal before announcing it would not appeal:

“While it would have been open to ASIC to seek special leave to appeal to the High Court to obtain a ruling on the construction of the statute, ASIC is mindful of the impact of the additional time required to resolve this matter in the current challenging economic circumstances.

“Any reform of the National Consumer Credit Protection Act (National Credit Act) to clarify further the enforcement of those principles is ultimately a matter for the Federal Government and Parliament.”⁵

On 14 August 2020, Reserve Bank Governor Philip Lowe commented on the RLOs during a hearing of the House Economics Committee:

“I think the principles in the legislation are sound, but I think the way we’ve translated those principles into reality needs looking at again. If we can’t do that properly, maybe we need to look at the legislation. We can’t have a world in which, if a borrower can’t repay the loan, it’s always the bank’s fault. On a portfolio basis, we want banks to make some loans that actually go bad, because if a bank never makes a loan that goes bad it means it’s not extending enough credit. The pendulum has probably swung a bit too far to blaming the bank if a loan goes bad, because the bank didn’t understand the customer; if it had done proper due diligence—this is the mindset of some—the bank would never have made the loan.”⁶

The Treasurer’s 25 September policy announcement noted that:

⁵ <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-166mr-asic-will-not-appeal-federal-court-decision-on-westpac-s-responsible-lending-obligations/>

⁶ <https://www.rba.gov.au/speeches/2020/sp-gov-2020-08-14.html>

“What started a decade ago as a principles based framework to regulate the provision of consumer credit has now evolved into a regime that is overly prescriptive, complex and unnecessarily onerous on consumers.”⁷

Unnecessarily complex regulation can affect consumers directly, by creating inconvenience and delay in lending decisions, but it also indirectly affects consumers by raising costs for all lenders and these costs are ultimately borne by borrowers.

A poor customer experience in obtaining credit may deter the customer from switching in future, reducing competition and overall consumer benefit.

The sheer scope of regulatory compliance is a challenge for all banking institutions. However, smaller lenders are subject to relatively higher regulatory costs due to the fixed cost factor and this hampers their capacity to grow and expand into new markets.

As noted by the Financial Services Royal Commission, financial services regulation is complex, labyrinthine and overly detailed. Simplifying a layer of this regulation is a welcome policy move, particularly in the context of the economic shock of the pandemic.

Removal of regulatory duplication to enhance competition

Under the current RLO regime, all ADIs are subject to two regulatory frameworks with respect to consumer lending, overseen by ASIC and APRA. While the dual regimes have broadly the same objective, duplication unnecessarily increases costs for ADI lenders.

A survey of COBA members in 2018⁸ found that “responsible lending” requirements were ranked as the most burdensome area of compliance, with participants concerned about the increasing depth of information required before they can lend to customers.

As noted in the Bill’s Explanatory Memorandum, the RLOs require lenders to devote resources to making a standard set of inquiries for an assessment in all cases, rather than prioritising resources to more high-risk borrowers or credit products. “This one-size-fits-all process approach further compounds competition issues, where large lenders have the economies of scale to more easily overcome the costs of investing in systems to meet the process requirements.”⁹

Simplification of the RLO regime will help support competition amongst lenders, both ADIs and non-ADIs, by creating a more level playing field and removing some of the unnecessarily onerous obligations in the credit application process.

Borrower protection

Simplification of the RLOs and removal of regulatory duplication should not diminish consumer protection, particularly given the multiple layers of consumer protection and the many additions to consumer protection regulation since the RLOs were introduced.

We agree with the Government that the objective of regulatory settings cannot be to avoid any single incident of consumer harm, but rather to set rules and expectations around the behaviour of lenders – as well as penalties for breaches and recourse for consumers should those rules be broken – but

⁷ <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/simplifying-access-credit-consumers-and-small>

⁸ https://www.grantthornton.com.au/globalassets/1.-member-firms/australian-website/industry/financial-services/pdfs/pdf-images/gtal_2018_coba_a_case_for_proportionate_regulation.pdf

⁹ National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020, Explanatory Memorandum, part 2.27

without imposing undue deadweight losses on the economy through excessive prescription in the practice of regulation.¹⁰

Since the introduction of RLOs into the Credit Act over ten years ago, a range of consumer protection measures have been created or enhanced.¹¹ Assuming the Bill is passed and RLOs are simplified, borrowers will also continue to be protected by multiple regulatory regimes, including:

- Credit Act obligations on credit licensees to act honestly and fairly
- increased maximum penalties under the Credit Act
- stronger protections for credit card customers through bans on unsolicited offers for limit increases and more online options on closing accounts or reducing account limits
- for ADI customers, APRA's standards and guidance to promote prudent lending
- banking industry codes such as the Banking Code of Practice and the Customer Owned Banking Code of Practice
- AFCA's dispute resolution regime based on 'fairness', and the capacity to make awards of damages for any 'direct financial loss' which consumers suffer as a result of lender conduct
- forthcoming design and distribution obligations applying to lenders
- forthcoming new breach reporting obligations applying to lenders
- best interests duty applying to mortgage brokers
- ASIC product intervention power, and
- ASIC Act powers to promote confident and informed participation by investors and consumers in the financial system.

I hope this submission assists the Committee in assessing the Bill. Please do not hesitate to contact Luke Lawler (llawler@coba.asn.au) or Maryanna Vasilareas (mvasilareas@coba.asn.au) if COBA can be of any further assistance to the Committee.

Yours sincerely,



MICHAEL LAWRENCE

Chief Executive Officer

¹⁰ National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020, Explanatory Memorandum, part 2.9

¹¹ National Consumer Credit Protection Amendment (Supporting Economic Recovery) Bill 2020, Explanatory Memorandum, part 2.7